TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED, PETITIONER,

vs.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 11, 1961

CERTIORARI GRANTED JANUARY 22, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED, PETITIONER,

vs.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 1, 1962

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 26343

DRAKE BAKERIES INCORPORATED, Plaintiff-Appellant,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendants-Appellees.

Appendix of Plaintiff-Appellant

[fol. 1]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Statement

On January 4, 1960 plaintiff Drake Bakeries Incorporated, the appellant herein, instituted this action by filing the complaint herein with the Clerk of the Court of the United States District Court for the Southern District of New York, said case being assigned the index number 60 CIV 16.

On February 12, 1960 defendant Local 50, American Bakery & Confectionery Workers International, AFL-CIO, and Louis Genuth, Secretary-Treasurer, Local 50, American Bakery & Confectionery Workers International, AFL-CIO, the appellees herein, served the plaintiff with a notice of motion for an order staying all proceedings in the action on the ground that the dispute referred to in the complaint was covered by the arbitration provisions of a collective bargaining agreement between the parties. Said motion came on to be argued before Chief Judge Sylvester [fol. 2] J. Ryan. On May 4, 1960 Chief Judge Ryan rendered a memorandum endorsed on the notice of motion, granting defendants' (sic) directing that an order be settled staying further proceedings in this action. On May 16, 1960 Chief Judge Ryan signed an order staying this action and all proceedings herein until arbitration has been had in accordance with the terms of the collective bargaining agreement between the parties.

Plaintiff served a notice of appeal on defendants' attorneys on May 27, 1960 and filed said notice of appeal with the Clerk of the District Court on May 31, 1960.

[fol. 3]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DRAKE BAKERIES INCORPORATED, Plaintiff,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendants.

COMPLAINT—Filed January 4, 1960

Plaintiff, Drake Bakeries Incorporated, now presents its complaint against defendants, Local 50, American Bakery & Confectionery Workers International, AFL-CIO, and Louis Genuth, Secretary-Treasurer, Local 50, American Bakery & Confectionery Workers International, AFL-CIO, thereof, by its attorneys, Weil, Gotshal & Manges, and respectfully states:

First: This is a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce within the meaning of Section 301(a) of the Labor Management Relations Act, as amended, (hereinafter referred to as the "Act"). The jurisdiction of this Court is based upon said Section 301 of the Act.

Second: Plaintiff is a corporation being duly organized and existing under and by virtue of the laws of the State of New York.

[fol. 4] Third: At all times hereinafter mentioned plaintiff was engaged in the sale and manufacture of bakery products in and around the State of New York and other places. In the course and conduct of its business, plaintiff caused a substantial amount of material used in such manufacture to be purchased, delivered and transported in

interstate commerce, and a substantial amount of materials manufactured and sold by it to be purchased, delivered and transported in interstate commerce. Plaintiff was engaged in an industry affecting commerce within the meaning of Section 2, Subdivision (7) of the Act.

Fourth: Defendants were and now are engaged in representing and acting for employee members within the City of New York. Defendant, Local 50, was and is a labor organization within the meaning of Section 2, Subdivision (5) of the Act. Defendants are collective bargaining representatives for certain employees of plaintiff employed at plaintiff's Brooklyn plant located at 77 Clinton Avenue, Brooklyn, New York.

Fifth: Defendants as the collective bargaining representatives of the above described employees, on behalf of themselves, the officers, agents and members of defendant, Local 50, entered into an agreement in writing on or about May 1, 1954 and amended thereafter by further writing dated July 27, 1955, and again by further writing dated August 15, 1958 with plaintiff, setting forth the basic agreement covering rates on pay, wages, hours of employment and other conditions of employment to be observed between the defendants, the officers, agents and members of defendant, Local 50, and the plaintiff.

Sixth: Such agreement between the plaintiff and the defendants was executed for the benefit of the defendants and the members of Local 50 and its benefits thereof were accepted by them and each of them.

[fol. 5] Seventh: Such agreement contained, among other things, the following clause:

"Article VII—No Strikes

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision."

Eighth: On or about January 2, 1960 and while the aforesaid agreement was in full force and effect the defendants and the agents and members of Local 50 in violation of the provisions of such agreement authorized, instigated and encouraged the members of defendant, Local 50, who are employees of the plaintiff's plant, located at 77 Clinton Avenue, Brooklyn, New York, to engage in a strike, a concerted stoppage, and/or cessation of services by instigating and encouraging said members to refrain from reporting to work on a regularly scheduled production day, namely, January 2, 1960.

Ninth: Said strike hereinbefore referred to in Paragraph "Eighth" hereof did not occur by reason of plaintiff's failure to abide by any decision of any arbitrator.

Tenth: Plaintiff has duly performed all the conditions of such agreement on its part to be performed.

Eleventh: As a result of the breach of the agreement, as aforesaid, by defendants and the action of defendants and the officers, agents and members of defendant, Local 50, plaintiff has been damaged in the sum of $25,000.00.

[fol. 6] Wherefore, plaintiff demands judgment against defendants for the sum of Twenty-five thousand ($25,000.00) Dollars together with the costs and disbursements of this action.

Weil, Gotshal & Manges, Attorneys for Plaintiff, Drake Bakeries Incorporated, By Edward C. Wallace, a member of the firm, Office and P. O. Address, 60 East 42nd Street, Borough of Manhattan, City of New York.

[fol. 7]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ 16

NOTICE OF MOTION

Sirs:

Please take notice, that on the complaint, and on the affidavit of Louis Genuth hereto annexed, the undersigned will move this Honorable Court at a stated term for motions to be held on the 25 day of February, 1960, U. S. Court House, Foley Square, for an order under and by virtue of the provisions of,

(a) Section 301, Labor-Management Relations Act or, in the alternative.

(b) New York Civil Practice Act Sect. 1451 or, in the alternative.

(c) United States Arbitration Act, 9 U.S.C. Sect. 3 for an order staying all proceedings in this action, on the ground that the dispute referred to in the complaint, and [fol. 8] several related disputes, are covered by the arbitration provisions of the collective bargaining agreement between the parties, and for such other relief as to the court may seem appropriate.

Dated: February 12, 1960.

Yours etc.,

O'Dwyer & Bernstien, Attorneys for Defendant, 40 Wall Street, New York 5, New York, by Paul O'Dwyer.

To: Weil, Gotshal & Manges Esqs., Attorneys for Plaintiff, 60 East 42nd Street, New York 19, N. Y.

[fol. 9]

IN THE UNITED STATES DISTRICT COURT

ATTACHMENT TO NOTICE OF MOTION

Excerpts from Collective Bargaining Agreement Between Drake and Local 50 Annexed to the Defendants' Moving Papers Herein

AGREEMENT made and entered into this 1st day of May 1954 by and between DRAKE BAKERIES INCORPORATED party of the first part, hereinafter referred to as the "Company" or the "Employer", and Local No. 50 BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA, affiliated with the American Federation of Labor, party of the second part, hereinafter referred to as the "Union".

WITNESSETH

WHEREAS, the Employer is engaged in the baking industry; and

WHEREAS, the Union represents certain employees of the Employer as hereinafter set forth; and

WHEREAS, the parties hereto desire to cooperate in establishing fair working conditions and also desire to provide methods for a fair and peaceful adjustment of all disputes that may arise between the parties hereto, so as to secure uninterrupted operation of working conditions in the business;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the parties hereto hereby agree as follows:

• • •

ARTICLE V—GRIEVANCE PROCEDURE

(a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

[fol. 10] In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.

(b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided.

ARTICLE VI—ARBITRATION

(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

(c) The decision of the Arbitrator shall be binding upon both parties for the duration of this contract.

(d) Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed [fol. 11] with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

(e) The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

ARTICLE VII—NO STRIKES

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision.

(b) The parties agree as part of the consideration of this agreement that neither the International Union, the Local Union, or any of its officers, agents or members, shall be liable for damages for unauthorized stoppage, strikes, intentional slowdowns or suspensions of work if:

(a) The Union gives written notice to the Company within twenty-four (24) hours of such action, copies of which shall be posted immediately by the Union on the bulletin board that it has not authorized the stoppage, strike, slowdown or suspension of work, and

(b) if the Union further cooperates with the Company in getting the employees to return and remain at work.

It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work [fol. 12] stoppage, subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike or work stoppage.

• • •

ARTICLE XI—WORK WEEK

(A) (1) Forty (40) hours in five (5) days shall constitute the basic work week.

(2) Every permanent employee who reports for work regularly every day during the work week will be guaranteed forty (40) hours of work for the week.

(3) The Union and the Employer will cooperate in all respects on all problems affecting the 5 day work week.

(4) The parties understand that it is the spirit and intent of this agreement for all employees to enjoy a 5 day week. The Union recognizes, however, that occasions may arise when it might become necessary for an employer to require that work be performed on the 6th and/or 7th consecutive day in a normal week; or the 5th, 6th and/or 7th consecutive day in a holiday week. The Union therefore agrees that if, under such circumstances, it cannot supply qualified workers, as requested by the Employer, it and the Shop Committee will cooperate with the Employer by having the regular employees work the extra day or days.

• • •

ARTICLE XIV—HOLIDAYS

(A) (1) New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Columbus Day, Thanksgiving Day and Christmas Day shall be known as [fol. 13] holidays. In a week in which any of the above mentioned holidays occur, the Employer guarantees forty (40) hours' pay for all time worked up to thirty-two (32) hours and thereafter time and one-half. Holiday work shall be paid for at the rate of double time, provided, however, that if workers get a day off either before or after the holiday within the holiday week the regular rates will apply.

(2) A holiday work week shall consist of 32 hours over a spread of 4 days. Double time shall be paid for all hours worked on the 5th, 6th and 7th consecutive days in a holiday week.

(3) An employee who fails to work during the holiday week on account of sickness will be entitled to the holiday allowance if he works either in the week before or the week after the holiday week.

• • •

ARTICLE XXIII—MISCELLANEOUS

* * *

NOTICE ON DAY OFF

(C) When an employee's day is to be changed or he is to be changed from one shift to another the Shop Committee shall be notified one (1) week in advance except in case of emergency.

* * *

COOPERATION ON ABSENTEEISM

(L) The Union agrees to cooperate with the Company to eliminate excessive absenteeism, particularly during a holiday week.

* * *

[fol. 14]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF JOHN MOLLENHAUER IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

John Mollenhauer, being duly sworn, deposes and says:

1. I am Plant Manager of the Brooklyn Plant of Drake Bakeries Incorporated, the plaintiff herein, and am fully familiar with the facts in this action. I am making this affidavit in opposition to the motion of the defendant for a stay pending arbitration.

2. Drake Bakeries Incorporated (hereinafter referred to as "Drake") is one of several companies engaged in the preparation and distribution of cake and other bakery products in New York City. For more than fifteen years Local 50, the defendant herein, has been the collective [fol. 15] bargaining agent for Drake's production employees and has had successive collective bargaining agreements with Drake, the last of which is currently in effect and is annexed to defendant's moving papers.

3. All of the companies in the bakery products industry are highly competitive and each tries to obtain whatever competitive advantage is possible. One of the crucial areas of this competition is the freshness of the product. If, at any time, our cake is not as fresh as a competitor's cake, Drake must of necessity suffer severe damage to its good will. If a consumer buys the stale cake he will thereafter associate our name with stale cake and be inclined as a consequence not to buy our cake the next time he goes shopping. Thus, one day's stale cake may not only damage our business for that day but also damages our reputation and name for freshness and quality, and hurts our sales for an indefinite period.

4. It needs no lengthy explanation to demonstrate the point that if we are unsuccessful in competing with the other companies in our industry, we must consequentially reduce the number of people we employ and eventually even discontinue our business altogether. Accordingly, it is vitally important not only to our officers and stockholders that we meet competition but to our employees as well. One way we must compete is to do everything within our power to insure that every product bearing our name is fresh, thereby maintaining our valuable reputation and name for freshness.

5. One troublesome problem in regard to fresh cake is holiday week-ends. This problem was particularly acute during the Christmas and New Year's holiday season of 1959-60. During that season Christmas and New Year's [fol. 16] Day fell on a Friday. Our employees would have that Friday off as a paid holiday. In addition, if we did not open our plant for production on the Saturday immediately following Christmas and New Year's Day, the cake we would send out for sale on the Monday or Tuesday after the holidays, would be cake actually baked on no later than the previous Thursday. Thus, we would be selling cake four to five days old under our name. Such cake would of necessity be stale.

6. As a result of these factors, we decided to schedule production on the Saturdays immediately following Christmas and New Year's Day in order to allow us to sell much

fresher cake. One of the factors which led to our decision to keep the plant open for production on Saturday was that our competitor, Ward Baking was also keeping their plant open for production on the Saturday after New Year's Day. If we were successfully to compete with Ward we, too, had to be opened on the Saturday after New Year's Day.

7. We also decided that in lieu of the Saturdays in question, the Thursdays before Christmas and New Year's Day would not be scheduled for production. These Thursdays were, of course, Christmas Eve and New Year's Eve, two days which people like to have off so that they may celebrate them with their families and prepare for the holidays. We thought that by not scheduling these two significant days for production we would be more than making up for their having to work the Saturdays after Christmas and New Year's Day.

8. We realized, of course, that some of our employees had made plans to spend the entire week-end away from the city. We were willing to let up to approximately 40% of our employees be absent on the Saturday after Christ- [fol. 17] mas since we did not anticipate any unusual demand for cake on the succeeding Monday or Tuesday and consequently we did not have to produce too much cake. But we did need approximately 60% of our employees so that we could fill the demands we would have.

9. We expected full cooperation from the Union despite the fact that because of different circumstances the company had not previously scheduled Saturday production. Work scheduling is and must be an inherent prerogative of management since only management is able to determine what the demands for its products are and what work schedules are necessary for our company to meet those demands and meet competition.

10. The fact that Drake has the unquestioned discretion to schedule production in any way which in its opinion will aid its business is apparent in the language of the collective bargaining agreement. Thus, Article XI (1) reads as follows:

"Forty (40) hours and five (5) days shall constitute the basic work week."

This clause clearly means that any day could be made a normal work day for any employee by Drake just so long as the employee in question had a five day forty hour work week. There is not here present the official language of Monday through Friday, nor are Saturdays and Sundays explicitly or implicitly excluded. In point of fact, since before the plant was organized more than fifteen years ago, we have regularly had employees working on maintenance on Saturdays and Sundays and have regularly had our production of pound cake on Sundays.

[fol. 18]

11. Management's prerogative is further strengthened by Article XI (4) which reads as follows:

"(4) The parties understand that it is the spirit and intent of this agreement for all employees to enjoy a 5 day week. The Union recognizes, however, that occasions may arise when it might become necessary for an employer to require that work be performed on the 6th and/or 7th consecutive day in a normal week; or the 5th, 6th and/or 7th consecutive day in a holiday week. The Union therefore agrees that if, under such circumstances, it cannot supply qualified workers, as requested by the Employer, it and the Shop Committee will cooperate with the Employer by having the regular employees work the extra day or days."

This clause similarly reflects Drake's right to alter the work week whenever "occasions may arise when it might become necessary". Certainly, if Drake could require an employee to work six or seven days a week, it has the right to reschedule work while maintaining a four day holiday week in accordance with its contractual obligation.

12. Finally, Drake's right to make any change in work schedule which it may find necessary is irrefutably established by Article XXIII (C) which reads as follows:

"NOTICE ON DAY OFF

(C) When an employee's day is to be changed or he is to be changed from one shift to another the Shop Committee shall be notified one (1) week in advance except in case of emergency."

The unmistakable meaning of this clause is that Drake may make any changes in work scheduling it may desire so long as it gives the Union one week's advance notice. Indeed, in cases of emergency it need not even give the [fol. 19] Union advance notice. If this is so, surely the contract must permit a rescheduling when the Union has received ample advance notice as it did in the present situation.

13. Furthermore, the Union itself has recognized that the present contract means that Drake is free to schedule Saturday production. It asked in 1954 for a new contract clause reading as follows:

"1. The work week shall consist of five (5) days, from Monday through Friday. Time and a half to be paid after seven (7) hours in any one day and/or after thirty-five (35) hours per week. The pay for the thirty-five hours shall be equivalent to present pay for forty (40) hours. The guaranteed work week shall be thirty-five hours. No work shall be performed on the sixth or seventh day unless agreed to by management, the Committee and the Union."

This request was, of course, denied during the 1954 contract negotiations. (Attached hereto as "Exhibit A" is a copy of the entire Union "Demands" for 1954.) The fact that Drake's right to schedule Saturday production was contested by the Union during a collective bargaining session and then rejected, definitely establishes that Drake under this contract has the full right to schedule production on Saturday whenever it deems it necessary.

14. Despite the clear language of the collective bargaining agreement, despite the scheduling of work on weekends consistently over many, many years, and despite

management's inherent right to reschedule production, the Union now claims that Drake had no right to open the plant for production on the two holiday week Saturdays simply because they had not done so in the past. While it is true that previously the competitive conditions of our industry (or the particular day of the week that [fol. 20] Christmas and New Year's Day happened to fall on) may have made scheduling of work on the Saturday of a holiday week-end unnecessary, these past circumstances can in no way affect whether or not such scheduling is necessary now. It is for exactly this reason that both common sense and the contract allow Drake full liberty to schedule work to meet the needs of the company.

15. The fact that management's rights to reschedule work cannot be changed by alleged past practice, may be demonstrated by an example. For many years the company may not choose to avail itself of its right to lay off employees. But this, of course, could never mean that the Company could never lay off an employee whenever, in the judgment of the employer, the economic circumstances warranted it.

16. Management's inherent and contractual rights to reschedule production do not mean that management must continually exercise them. Rather as inherent prerogatives they must be always available so that management *can* utilize them whenever the circumstances in its judgment demand their exercise.

17. Once having made our decision, we took steps to notify both the Union and our employees promptly so that they would be inconvenienced as little as possible and in order that they would be able to make their personal plans for the holidays as soon as possible. Mr. Curran, our personnel manager, told the Union Shop Committee of this schedule on December 16th, fully ten days before the first Saturday on which we would be open for production (rather than the one week's notice called for under the contract). On the same day we also personally gave each of our employees a written copy of the holiday week schedules. We sent these schedules by mail to the homes

[fol. 21] of our employees who were absent on the day we notified our other employees. We also had a notice posted on our bulletin board informing all of our employees of the holiday schedules. I am annexing to my affidavit as "Exhibit B" and "Exhibit C" copies of the notice sent to our employees and posted on our bulletin board.

18. On December 18th, five representatives of Drake including myself met with the Union Committee to further explain the competitive necessity for opening our plant for production on the Saturdays during the holiday season.

19. We personally devoted many hours to explain to our employees the reasons why we were compelled to schedule production on the two Saturdays involved. Along with other representatives of the employer, I visited each department of our plant and personally explained to our employees why we had Saturday production scheduled.

20. We thus did everything that we possibly could do in order to minimize what inconvenience there would be for our employees. We took steps to insure that each employee would have an early personal notice of his work schedule. We notified the Union sooner than we were required to do under the contract. We were willing to allow a substantial number of our employees to absent themselves during this work day period. We deliberately did not schedule production for Christmas Eve and New Year's Eve. We personally talked to each department. In short, we took every reasonable step which we could take to aid our employees.

21. On December 22nd we met with the Union Committee at its request. We were informed that we had been misinformed about the Union's position. It stated that [fol. 22] it was not instructing its members not to report for work on Saturday. It further stated that there *would* be sufficient employees in to do the necessary work as Drake had requested, but wished to exact from Drake a commitment that any remaining employees who did not show up for work would not be subject to disciplinary action. We accepted this arrangement provided that enough employees reported to meet the needs of the scheduled production.

22. The day after Christmas, eighty employees out of one hundred ninety-one employees scheduled for production showed up. While this number was far less than we had hoped for, we were able to engage in production thanks, in part, to several standby employees whom we called to report for work on that day.

23. During the next week we were again concerned with whether or not our employees would show up on January 2nd, the Saturday after New Year's Day which had, as I have noted, also been long scheduled as a production day. This day was far more important to Drake than the Saturday before Christmas since the period after New Year's Day is traditionally one of peak demand in our industry while the period between Christmas and New Year's is generally one of slack demand. Accordingly, it was far more imperative that we have our plant open for production after New Year's Day, than we have it open for production on the Saturday before Christmas. Only in that way could we meet the heavy demand for our cake during the post New Year's Day period.

24. I sent a telegram to Mr. Genuth of the Union reiterating our position in regard to work on January 7th. A copy of that telegram is annexed to my affidavit as Exhibit "D". Once again I along with other representa-
[fol. 23] tives of Drake visited each department so that we could tell our employees the importance to them of our meeting competition and how this necessity for meeting competition required that we work on the coming Saturday. We even went so far as to send a telegram to the parent International of the Union advising them of the situation. A copy of that telegram is annexed to my affidavit as Exhibit "E".

25. I cannot too strongly emphasize that despite almost three weeks of prior notice as to the required production on Saturday, January 2nd, the Union took no step to arbitrate any alleged claim that the employer was not acting fully within its contractual rights. Indeed at a meeting on December 28th requested by the Union, Mr. Killoran specifically made it clear that the employees would not report on January 2nd.

26. On January 2nd only twenty-six employees out of one hundred and ninety-one showed up. This number was far less than the minimum number of employees necessary for us to actually engage in production and, therefore, we were forced to close down our plant on this vitally important production day. Accordingly, we lost thousands and thousands worth of dollars of production on that day. This loss of production was doubly aggravated by the loss in good will due to the fact that we had not produced any cake on the Thursday before New Year's. Thus, the bulk of the cake bearing our name in the stores on that following Monday and Tuesday was six to seven days old. The enormous loss we suffered both in money and in good will can only be attributed to the arbitrary and unlawful conduct of the Union in flouting its contractual obligation not to strike when it had more than enough time to arbitrate any alleged grievance it claimed to have.

[fol. 24] 27. Before concluding this affidavit I would like to comment on the Union's statement in its moving papers that Drake had previously attempted to arbitrate a breach of the no-strike clause. Drake's attorneys have informed me that in any event Drake's prior actions in other situations and its choice of remedies are irrelevant to its right to seek relief in Federal Court for this particular illegal strike. But besides this, the Union's conduct during the arbitration referred to demonstrates both the necessity for having this matter decided by a court and the basic inconsistency and irresponsibility of the Union. I will, therefore, detail the Union's contract during this previous arbitration.

28. During the summer of 1959 the Union instigated a concerted refusal among our employees to engage in any overtime work. As indicated by my letter which is quoted in full in the Union's moving papers, Drake attempted to have this breach of the no-strike clause submitted to arbitration under the arbitration clause of the contract. At the arbitration before Miss Mabel Leslie, a board member of the New York State Board of Mediation, the Union took the position that the issue of the violation of the no-strike clause was not arbitrable under the contract and, therefore, the arbitrator lacked any jurisdiction to hear our

case and consequently any jurisdiction to award damages or any other relief. I am annexing to my affidavit as Exhibit F a copy of a Union letter to the State Board of Mediation setting forth its position. Throughout this argument the Union consistently insisted that the only remedy Drake had was in the courts rather than before an arbitration tribunal. The Union even refused to let the arbitrator decide the question of whether or not she had jurisdiction to hear the arbitration. Accordingly, they told the arbitrator that if she went ahead with the arbitration they would be forced to leave.

[fol. 25] 29. As a result of the Union's threat to walk out, the arbitrator decided not to go ahead with the hearing. Drake was forced, therefore, to try and settle the dispute with the Union as best it could through negotiation. Consequently, Drake became convinced that arbitration proceedings were an unsatisfactory way to handle breaches of the no-strike clause. The Union could stalemate the entire proceeding by insisting the dispute was not arbitrable and had to be resolved by the courts. Faced with such an argument by the Union coupled with a Union threat to walk out of any arbitration hearing considering such an issue, an arbitrator would be tempted to do what Miss Leslie did, that is to leave the dispute to the parties to resolve between themselves. The arbitrator would then not have to rule on a legal question for which he might lack the legal background and training necessary to a proper understanding of the issues. But such a course would be completely unsatisfactory to the employer since it would then be without any remedy for the breach of the most important clause in the contract from its standpoint —the no-strike clause. This would, of course, make the entire contract a one-way street. The Union on the one hand could enforce by arbitration innumerable restrictions on the employer, while the employer's primary restriction on the Union, the restriction on its right to strike, would be uncertain. Such a situation dictated our decision to institute a Federal Court action for this particular breach of the no-strike clause.

30. Before leaving the incident of the overtime strike, I would like to point out the basic inconsistency of the Union's position. When the Union breached the no-strike clause, during the overtime strike and we tried to remedy that breach through an arbitration proceeding, the Union [fol. 26] insisted that our remedy was to be found in the courts rather than before an arbitrator. Now they have breached the no-strike clause once again, but this time we are seeking relief in Federal Court. Today it is the Union's position that our only remedy is before an arbitrator and not before a court. It seems to be the Union's position that whatever remedy we pick is the improper one and whichever one we have not picked is the proper one. To allow the Union once again to escape the consequences of its violation of the no-strike clause through such an argument can only encourage it to breach this clause again whenever it may desire.

John Mollenhauer

Sworn to before me this 24th day of March, 1960.

Hazel L. Cohen, Notary Public, State of New York, No. 31-5738985, Qualified in New York County, Commission Expires March 30, 1962.

(Exhibits to affidavit are not printed.)

[fol. 27]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM ENDORSED ON NOTICE OF MOTION—May 4, 1960

On January 4, 1960, the plaintiff Drake Bakeries, Incorporated, instituted this suit to recover damages for an alleged breach of the "no-strike provision" of a collective bargaining agreement, pursuant to Section 301(a) of the Labor-Management Relations Act, *29 U.S.C.A. 185.*

Prior to interposing an answer to the complaint, defendant moves this Court, under Section 3 of the United States Arbitration Act, *9 U.S.C.A. 3,* for a stay of trial pending an arbitration proceeding in accordance with the terms of the collective bargaining agreement. That the

Court has jurisdiction and power to enforce the arbitration clause of this contract is established now by *Textile Workers* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957).

The basic grounds upon which plaintiff opposes this application may briefly be summarized as follows: (1) The arbitration provision of the agreement is at best permissive and not mandatory; (2) The action of the union in striking in the face of the no-strike clause (Art. VII of the agreement) acted as a waiver of its rights under the grievance and arbitration provisions; (3) By failure to proceed to arbitration the defendants expressly waived their arbitration rights.

We find no merit in these contentions.

1. A reading of the provisions governing arbitration (Articles 5 and 6) shows that *all* complaints, disputes or grievances *shall* be submitted to arbitration. We find nothing permissive there and hold that this dispute is to be arbitrated.

2. Plaintiff next contends that, even if arbitration be mandatory, by violating one clause of the agreement defendants waived their rights under another clause (arbitra-
[fol. 28] tion). We can find no logical basis for this argument, since if this premise were sustained, every violation of a collective bargaining agreement would act as a waiver of the violating party's right to arbitration, and this would destroy all arbitration agreements which are looked upon with great favor. *Markel Electric Products* v. *United Electrical, Radio & Machine Workers, et al.*, 202 F. 2nd 435. Aside from the purely logical objection to plaintiff's contention, it appears that the better reasoned decisions allow arbitration after a violation of a no-strike provision. *Signal-Stat Corp.* v. *Local 475, etc.*, 235 F. 2nd 298 *cert. den'd* 354 U. S. 911; *Lewittes & Sons* v. *United Furniture Workers*, 95 Fed. Supp. 851.

3. We come then to plaintiff's final contention that the union's failure to proceed to arbitration constitutes a default on the union's part and thus the union has waived its right under the arbitration provision. Since plaintiff was and is the aggrieved party and since there is no evi-

dence before the Court that plaintiff ever attempted to proceed to arbitration by a written demand as required by Article V, Section 6 of the agreement, defendants' failure to initiate arbitration does not amount to a waiver under the circumstances.

We conclude that the arbitration agreement must be enforced and direct that an order be settled staying further proceedings in this suit.

Settle order on notice.

May 4, 1960.

Sylvester J. Ryan, U. S. D. J.

[fol. 29]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER APPEALED FROM

A motion having been duly made by the defendant for an order staying this action on the ground that the plaintiff's alleged grievance, as set forth in the complaint, is subject to the arbitration provisions of a collective bargaining agreement between the parties, and the Court having heard counsel for the parties and having given due deliberation and rendered its decision herein, dated May 4, 1960, it is on motion of O'Dwyer & Bernstien, attorneys for the defendant

Ordered, that this action and all proceedings herein shall be and the same hereby are stayed until arbitration has been had in accordance with the terms of the collective bargaining agreement between the parties.

Sylvester J. Ryan, United States District Judge.

[fol. B]

No. 26,343

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DRAKE BAKERIES INCORPORATED, Plaintiff-Appellant,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendant-Appellee.

Appellee's Appendix

[fol. 30]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 16

NOTICE OF MOTION

Sirs:

Please take notice, that on the complaint, and on the affidavit of Louis Genuth hereto annexed, the undersigned will move this Honorable Court at a stated term for motions to be held on the 25th day of February, 1960, U. S. Court House, Foley Square, for an order under and by virtue of the provisions of,

(a) Section 301, Labor-Management Relations Act or, in the alternative.

(b) New York Civil Practice Act Sect. 1451 or, in the alternative.

(c) United States Arbitration Act, 9 U. S. C. Sect. 3

for an order staying all proceedings in this action, on the ground that the dispute referred to in the complaint, and [fol. 31] several related disputes, are covered by the arbitration provisions of the collective bargaining agreement between the parties, and for such other relief as to the court may seem appropriate.

Dated: February 12, 1960.

Yours etc.,

O'Dwyer & Bernstien, Attorneys for Defendant, 40 Wall Street, New York 5, New York, by Paul O'Dwyer.

To:

Weil, Gotshal & Manges, Esqs., Attorneys for Plaintiff, 60 East 42nd Street, New York 19, N. Y.

AFFIDAVIT OF LOUIS GENUTH, READ IN SUPPORT OF MOTION

[Same Title]

State of New York,
County of New York, *ss.*:

Louis Genuth, being duly sworn, says:

I am the Secretary-Treasurer of Local 50, American Bakery & Confectionery Workers, AFL-CIO, Defendant herein. I make this affidavit in support of a motion to stay [fol. 32] the action, pending arbitration of the dispute involved, and several other related disputes, all as provided for by the Collective Bargaining Agreement in effect between the parties.

1. Scope of the Agreement to Arbitrate

The complaint makes reference to a collective bargaining agreement between Drake's and Local 50, but omits to state that said agreement contains provisions for arbitration of

> "All complaints, disputes or grievances arising between them involving.
>
> [a] questions of interpretation or application of any clause or matter covered by this contract,
>
> [b] or any act or conduct or relation between the parties hereto, directly or indirectly" (Arts. V, VI).

I am advised by my counsel, Messrs. O'Dwyer & Bernstien, that this is the broadest type of arbitration clause, and is often construed to require that questions of arbitrability, as well as the merits, be decided by the arbitrator.

2. The "Complaint, Dispute or Grievance" Referred to by Plaintiff's Pleading

The plaintiff alleges that Local 50, "authorized, instigated and encouraged" its members employed by Drake's

to engage in a strike by refraining from "reporting to work on a regularly scheduled production day, namely, January 2, 1960."

I deny that Local 50, directly or indirectly, engaged in a strike on January 2, 1960. A strike is a cessation of work as a means of enforcing compliance with some de- [fol. 33] mand. The men who did not work January 2, refrained from doing so for one reason and only one reason: because they believed in good faith they were not required to do so.

January 2, 1960, was the middle day of a three-day holiday week-end. It had become part of the agreement established by past practice of many years, that the company's employees were not to be required to work on such a day. By telegram of December 22, 1959, John Mollenhauer, plant manager of plaintiff confirmed his previous verbal requests "BECAUSE OF THE NEED TO MEET PRESENT PROBLEMS" and as part of "AN ATTEMPT TO BETTER SERVE THE PUBLIC WITH FRESHER PRODUCTS" and stated the company would "REQUIRE THE NECESSARY PERSONNEL TO WORK A REVISED HOLIDAY SCHEDULE."

I answered this telegram by saying,

> "WE HAVE INFORMED YOU THAT WE DID NOT AGREE WITH, OR ACCEPT YOUR PROPOSAL TO AMEND OR ALTER PAST PRACTICE CONCERNING HOLIDAY WEEKENDS. YOUR PROPOSED SCHEDULE AND YOUR THREATS OF DISCIPLINARY PENALTIES VIOLATES CONTRACT AND PRACTICE * * * IF YOU DO NOT RETRACT POSITION WE SHALL DEMAND ARBITRATION."

Further negotiations and telegrams ensued, as a result of which some of the employees volunteered to work Saturday, December 26, "WITHOUT PREJUDICE TO OUR CLAIM OF PAST PRACTICE AND WITHOUT PREJUDICE TO NEGOTIATION OF A RATE OF PAY FOR WORK DONE IN SUCH CIRCUMSTANCES."

None of our members, however, volunteered to work on January 2, 1960, and as a result, a number of arbitrable controversies arose, which are reviewed in our attorneys' letter of January 14, 1960, annexed hereto and made part hereof.

[fol. 34] Briefly, the issues are

(a) Could the Company unilaterally change a past practice pertaining to work on holiday week ends;

(b) Was this action brought in violation of the arbitration clause;

(c) When employees work on a holiday week end, what rate of pay prevails;

(d) May employees be reprimanded for refraining, in good faith, from reporting to work;

(e) May employees be deprived of holiday pay for refusal to work an additional day;

(f) May work during a holiday week be cancelled in face of a guaranty of forty hours pay.

As is explained in our attorneys' letter annexed hereto, arbitration was frustrated and prevented by the commencement of this action on January 4, 1960, the first business day after January 2.

3. Company's Own Past Construction of the Arbitration Clause as Comprehending Claim of Violation of "No Strike" Clause

I am annexing to this affidavit the text of the current collective bargaining agreement, and all amendments to date. As evidence that the commencement of this action was a violation of the arbitration clauses of the agreement, I need only refer to an instance in the recent past, when this very company claimed (without justification), that our members were engaged in an "Overtime Strike."
[fol. 35] In August 1959, Mr. Mollenhauer wrote the New York State Board of Mediation as follows:

"State Mediation Board of New York State
270 Broadway
New York 7, New York

Re: Drake Bakeries Incorporated

vs.

Local 50, American Bakery and Confectionery Workers International, AFL-CIO

Gentlemen:

Our Contract provides for the arbitration of disputes before an arbitrator appointed by the New York State Mediation Board.

We request the appointment of an arbitrator to be selected by the parties from a panel submitted to the parties in your Board. The arbitrator shall determine the question of breach of contract and damages suffered by this Company as a result of any overtime strike that started at our Brooklyn plant on Sunday, August 16th. We request an award of damages against Local 50, American Bakery and Confectionery Workers International, AFL-CIO for damages already sustained by this Company, together with an additional sum in damages for each and every day that this overtime strike continues.

In addition we will request injunctive relief enjoining continuance of this overtime strike.

We respectfully request that this matter be given priority treatment and that a panel of impartial arbitrators be furnished to the parties immediately so that an arbitrator may be selected without delay.

[fol. 36] A copy of this letter is simultaneously being sent to Mr. Louis Genuth, Secretary-Treasurer of Local 50.

Very truly yours,

DRAKE BAKERIES INCORPORATED
JOHN A. MOLLENHAUER
Assistant Manager"

JAM:pc

As a result of the foregoing, we received the following notice of hearing from the State Mediation Board, which as a matter of long-established administrative practice and routine handles arbitrations arising from claims of violation of various "no strike" clauses:

"Drake Bakeries, Inc.
77 Clinton Avenue
Brooklyn 5, N. Y.

Att: Mr. John A. Mollenhauer, Asst. Mgr.
Local 50, American Bakery & Conf. Wkrs.
799 Broadway
New York 3, N. Y.

Issue: Breach of contract & damages as a result of an overtime strike

Arbitrator: Miss Mabel Leslie

Gentlemen:

We have been asked to name an arbitrator in the dispute stated above. It is our understanding that this request is made pursuant to the terms of an existing collective bargaining agreement. We have accordingly designated a member of our Board who will conduct a hearing at the office of the Board, 270 Broadway, on Monday, September 14, 1959, at 2 P. M.
[fol. 37] Please be present at that time and ready to proceed. Bring the labor contract with you and any records which may be pertinent. Any question concerning this designation or Board procedure should be directed to me.

Very truly yours,

cc: Robert Abelow, Esq.
60 East 42nd St., N. Y. C.
O'Dwyer & Bernstien, Esqs.
40 Wall St., N. Y. 5

Louis Yagoda
District Director"

Our union denied that there was any merit to the claim that an "overtime" strike was taking place; in any event, the matter was ultimately settled.

Now, however, the Company seeks to by-pass the arbitration tribunal which the parties had agreed to resort to, and seeks to litigate one aspect of a dispute that actually manifests itself in a number of separate questions for arbitration.

Incidentally, on behalf of the union I admit paragraphs Second, Third, Fourth, Fifth, Sixth, and Seventh of the complaint except that I would like to point out with respect to "Fifth", that the agreement incorporates, by labor-management usage, certain past practices not expressly set forth; and I would like to add, with respect to paragraph "Seventh" that the written parts of the agreement, including the arbitration clause, are annexed to this affidavit. I deny paragraphs Eighth, Ninth, Tenth, and Eleventh. Paragraph First merely states a legal conclusion. I respectfully pray that the court treat this affidavit as a counterclaim for specific performance of an agreement to arbitrate, and this motion as a motion for summary judgment on such counterclaim, if, in the court's opinion, such is procedurally appropriate.

[fol. 38] Wherefore, since the issues in this action are referable to arbitration under the agreement of the parties, together with the issues specified in the annexed letter of O'Dwyer & Bernstien dated January 14, 1960, the defendant respectfully requests that the trial of this action, and all proceedings therein be stayed, and that arbitration be directed in accordance with the terms of the agreement.

Louis Genuth

(Sworn to February 12, 1960.)

LETTER FROM O'DWYER & BERNSTIEN TO PLAINTIFF'S ATTORNEYS

January 14, 1960

Re: Drake Bakeries, Incorporated and
Local 50 A. B. C.-A. F. L.-C. I. O.

Weil, Gotschal & Manges
60 East 42nd Street
New York 17, N. Y.

Gentlemen:

Some days prior to December 22, 1959, your client Drake Bakeries, Incorporated, proposed to our client Local 50 of the American Bakery & Confectionery Workers, A.F.L.-C.I.O. that Local 50 should amend or alter the long-standing past practice and agreement between the parties concerning holiday weekends. Various reasons were given by your client for this request to make a change, which reasons are not of particular pertinence at this time.

Our client, after negotiation, declined to accept the change that your client had proposed. Your client then claimed that the refusal of Local 50 to agree to the proposed change of contract and practice subjected its members to disciplinary action. Your client was promptly informed that the threat of disciplinary action violated the collective bargaining agreement.

[fol. 39] Without prejudice to the position taken by the parties, and without prejudice to the negotiation of a rate of pay for work done in the circumstances, some of the members of Local 50 volunteered to work on Saturday, December 26th. In accordance with the collective bargaining agreement, the union submitted in writing the grievance pertaining to rate of pay for voluntary work.

In violation of the collective bargaining agreement, your client then instituted an action in the United States District Court for the Southern District of New York. Your client also purported to issue written reprimands to three members of the shop committee of the union. Your client also read a letter dated January 5, 1960, to the members of our client employed in the Brooklyn plant, but refrained from sending the text of the letter to our client.

There have thus arisen the following separate arbitrable controversies, all relating to the same subject matter:

1. Whether the company violated the contract by filing an action in the federal court in violation of the arbitration clause, thereby imposing on the union the expense of defending such action;

2. In view of the contract and past practice of the parties pertaining to holiday weekends, what shall the rate of compensation for employees reporting for duty on December 26, 1959, be;

3. Whether there was just cause for the written reprimands issued by the company to members of the shop committee under date of January 4, 1960;

4. Whether there was just cause for withholding holiday pay as announced by the company's letter of January 5, 1960;

5. Whether the employees of the company who worked, or were ready, willing and able to work, thirty-two hours during the weeks ending, respectively, December 25, 1959, [fol. 40] and January 1, 1960, are entitled, pursuant to the contract, to forty hours pay for such weeks.

In the case of each of such issues the question is also raised: What shall the remedy be?

Local 50 has asked us to take each of these issues to arbitration. We are informing your client through a copy of this letter of the intentions of the local in this matter, and each of these issues is hereby submitted in writing to the extent not heretofore submitted in writing, or discussed on the merits in lieu of submission in writing.

However, in the circumstances it seems appropriate to dispose of the federal court action by motion to dismiss or motion to stay, as the court may determine to be appropriate. Pending final determination in the federal court action of such motion to dismiss or stay, it would not seem proper to prosecute the arbitrations enumerated herein. We are therefore sending a copy of this letter to the New York State Mediation Board, so that it may take note of the existence of the situation, and we hereby notify your

client through you that when the federal court action has been disposed of we shall ask that these arbitrations be placed on the calendar of the Mediation Board.

Respectfully yours,

HNM:ms

cc: Drake Bakeries, Incorporated,
77 Clinton Ave., Brooklyn 5, N. Y.

cc: New York State Mediation Board,
270 Broadway, New York, N. Y.

cc: Local 50, Amer. Bakery & Conf. Workers Intl,
799 Broadway, New York, N. Y.

[fol. 41]

IN THE UNITED STATES DISTRICT COURT

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

Agreement made and entered into this 1st day of May 1954 by and between Drake Bakeries Incorporated party of the first part, hereinafter referred to as the "Company" or the "Employer," and Local No. 50 Bakery and Confectionery Workers' International Union of America, affiliated with the American Federation of Labor, party of the second part, hereinafter referred to as the "Union."

• • •

Foremen

(F) Foremen and foreladies shall not be permitted to work.

Share the Work

(G) The Employer agrees to the principle of sharing the available work among regular employees. The practical application of this principle shall be a matter for discussion and agreement between the Employer and the Union in the event of a reduction in the work available.

• • •

Cooperation on Absenteeism

(L) The union agrees to cooperate with the Company to eliminate excessive absenteeism, particularly during a holiday week.

• • •

(N) The Union agrees to require its members to comply fully with all of the terms of this contract and the Employer agrees for itself and its representatives to comply fully with all of the terms of this contract.

• • •

[fol. 42]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF HOWARD N. MEYER, READ IN SUPPORT OF MOTION

State, County and City of New York, ss.:

Howard N. Meyer, being duly sworn, says:

I am associated with defendants' attorneys, and have personal knowledge of some of the events referred to in the plaintiff's answering affidavit. I am the attorney referred to in the Union's letter (Exh. F to the Employer's affidavit), who was "away on vacation" when the Union's letter of August 26, 1959 was written.

Mr. Mollenhauer is entirely incorrect in stating, as he does (p. 13)* that the Union claimed that a violation of the "no-strike clause" was not arbitrable. I know. I was there. No such claim was made. I stated for the Union that because of the 1953 deletion of the "compulsory overtime" clause, there was no arbitrable controversy *as to the claimed existence of an obligation to work overtime* when the employer so directed. I never said the "only remedy" the employer had was in the courts. I took the position—the position required under Section 1458 of the New York Civil Practice Act—that the employer should serve a

---

* Appellants' Appendix, p. 24a.

"ten-day" notice of intention to arbitrate since the Union claimed that the 1953 deletion of the compulsory overtime clause subtracted that issue from the area of arbitrable controversy under the contract.

The question raised was not whether the arbitrator had "jurisdiction" but whether the employer's position in de- [fol. 43] manding compulsory overtime (after having bargained away, in 1953, a compulsory overtime clause), was so frivolous as to be non-arbitrable under the New York cases dealing with such questions. The Arbitrator did *not* decide not to go ahead with the hearing, but only to adjourn it, so that the employer could either serve a ten-day notice, or move to compel arbitration. The parties settled the dispute and that was the end of it. But the Union never took the position that the employer's remedy for the substantive dispute was in the courts.

Mr. Mollenhauer's lengthy affidavit goes into many matters, and is inaccurate as to some of them. But what is most important is its failure to show by a scintilla of evidence that there was even a strike on January 2d, 1960. He says that 80, out of 191, came in on December 26, and does *not* call this a "strike"—and that 26, out of 191, came in on January 2—and decides this *was* a "strike."

What he forgets, however, is that a strike is a legally identifiable series of events of which a characteristic part is a *demand;* i.e., "a strike is a cessation of work as a means of enforcing compliance with some demand upon the employer" (40 Words & Phrases, 309). Here, however, there was a mere failure to come to work, by employees who did not regard themselves as obligated to come to work. They did come to work on the next business day; they made no demands, directly or indirectly, while they were out.

Most of Mr. Mollenhauer's affidavit is an exposition and explanation as to the need for fresh cake and why he wanted to change his company's holiday weekend practices. Such exposition is of no importance here, where the only question really presented is, was there a collective bargaining agreement with an arbitration clause broad enough to cover an alleged violation of the no-strike clause. There is no issue raised as to the employer's "right to open the plant" (par. 14). The issue is whether regular employees may be

required to work at straight time under pain of disciplinary action when "the company had not previously scheduled Saturday production" (par. 9).

[fol. 44]

This is typically a question for an arbitrator. Since the employer knew, before January 2, that the Union did not agree with its position on the question the employer could have taken it to arbitration long before.

In point of fact the Union, as soon as it got wind of the employer's position, served notice December 22 "YOUR PROPOSED SCHEDULE AND YOUR THREATS OF DISCIPLINARY PENALTIES VIOLATES CONTRACT AND PRACTICE * * * IF YOU DO NOT RETRACT POSITION WE SHALL DEMAND ARBITRATION." Subsequently, the Union submitted in writing, as required by the grievance procedure, and as a prelude to arbitration, its grievance as to the proper rate of pay for the employees who reported December 26. The only reason why this was not taken to arbitration is that the contract required that seven days elapse (Art. V(b)) and by the time such period had expired this action had begun.

The major part of the Employer's brief herein is an attempt to reargue and persuade this Court to overrule the decision of the Court of Appeals in Signal-Stat. The balance—Point II—which attempts to distinguish the contract language in Signal-Stat overlooks the contract language in *Lewittes* (95 F. Supp. 851) is quite similar to that of the present contract.

Incidentally, as to the ultimate merits of the dispute, the Court, in our view, is not primarily concerned. However, it is important to balance the written contract provisions cited by Mr. Mollenhauer against the practice which he admits to, namely, that for fifteen years or more, "the company had not previously scheduled Saturday production" under the circumstances involved in this case. The Company has in the recent past procured an arbitration award to be rendered on the basis of abandonment of a written contract clause by the conduct and practice of the parties. It succeeded in persuading Hon. Burton B.

[fol. 45]

Turkus, a member of the New York State Board of Mediation, so to hold, in an award acknowledged August 24, 1956, where he held *In the Matter of Drake Bakeries Inc.* and *Local 50*:

"Labor relations is a continuing day-to-day process. It is a dynamic process with sometimes slowly, sometimes rapidly, changing relationships. Periodically, perhaps annually, bi-annually, etc., the relationship is formalized by the negotiation and execution of a collective bargaining agreement. After that it reverts to the more informal, dynamic, evolving relationship.

"The agreement between the parties on sharing the work when formalized in the collective bargaining agreement would appear to be without exception. But the proof is that on prior occasions, the company had laid off personnel as the result of technological improvements and the Union has not sought to discuss and agree upon the practical application of the agreed principle of sharing the work in such situations. The Union then, by its continuing course of conduct over the years, has evinced a clear-cut recognition that it does not consider the 'Share the Work' clause operative in cases of lay-offs resulting from technological advances and improvements. The parties by their day-to-day relations have in effect limited, amended and finalized a portion of their formal collective bargaining agreement."

This action never should have been begun, and should now be dismissed or stayed.

Howard N. Meyer

(Sworn to April 5, 1960.)

[fol. 46]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL AFFIDAVIT OF LOUIS GENUTH, READ IN SUPPORT OF MOTION

State, City and County of New York, ss.:

Louis Genuth, being duly sworn, deposes and says:

I wish to supplement my moving affidavit by exhibiting to the Court a notice, posted February 22nd, 1960, by the plaintiff.

This notice, which speaks for itself, demonstrates that the company has reverted to its past practice and respected the three day weekend which occurred on Washington's birthday.

This reinforces our claim—which we expect to prove to the satisfaction of the arbitrator agreed upon by the parties—that there was no "strike" on January 2nd, but, rather a refraining in good faith from reporting to work in the belief, honestly held, that there was no contractual obligation to report.

Louis Genuth

(Sworn to April 5, 1960.)

[fol. 47] To: ALL EMPLOYEES From: J. P. CURRAN

Subject: WASHINGTON'S BIRTHDAY HOLIDAY SCHEDULE Date: 2-12-60

We reviewed our work schedule for the coming Holiday week (Washington's Birthday) and the schedule will be Tuesday thru Friday, generally.

The night shifts will be off Sunday P. M. and will work on Monday P. M., February 22nd.

[fol. 48]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—October Term, 1960.

(Argued December 13, 1960)

Docket No. 26343

DRAKE BAKERIES, INCORPORATED, Plaintiff-Appellant,

—v.—

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendant-Appellee.

Before:

LUMBARD, *Chief Judge* and
SWAN and MOORE, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York by which Chief Judge Ryan stayed plaintiff's action brought pursuant to section 301(a) of the Labor-Management Relations Act, 29 U. S. C. A. §185(a) for alleged breach of the "no-strikes" provision of a collective bargaining agreement between the parties, until arbitration has been had in accordance with the terms of said agreement. Reversed.

Robert Abelow, of Weil, Gotshal & Manges, New York City, *for plaintiff-appellant.*

[fol. 49] Howard N. Meyer, of O'Dwyer & Bernstien, New York City, *for defendant-appellee.*

OPINION—February 17, 1961

SWAN, *Circuit Judge*:

This is an appeal by plaintiff, referred to herein as Drake, from an order entered in an action filed in the court below on January 4, 1960. The action was brought pursuant to §301(a) of the Labor-Management Relations Act, 29 U. S. C. A. §185(a), to recover damages for breach of a "no-strikes" provision in a collective bargaining agreement between plaintiff and defendant, Local 50, referred to herein as the Union.[1] Before answering the complaint the Union moved under section 3 of the Arbitration Act, 9 U. S. C. A. §3, to stay all proceedings in the action until arbitration was had in accordance with the terms of an arbitration provision in the collective bargaining agreement. From the order granting this motion Drake has appealed.

The affidavits in support of, and in opposition to, the motion raise no dispute as to the facts which brought about the alleged strike that caused Drake to bring its action. Drake is engaged in the production and sale of cake. [fol. 50] During the winter of 1959-1960, Christmas and New Year's Day fell on Friday. If Drake's cake was baked on the Thursday before Christmas or New Year's and sold on the Monday following these holidays it would not be fresh. This would impair Drake's competitive position with

[1] Section 185(a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Subsection (b) deals with the responsibility of labor organizations and employers for the acts of their agents, declares a labor organization an entity for purposes of suit, and provides for the enforcement of money judgments against labor organizations. Subsection (c) although framed in terms of 'jurisdiction,' deals with venus. Subsection (d) deals with service of process on labor organizations. Subsection (e) deals with determination of the question of agency."

concerns which did produce cake on the Saturdays following the holidays and would injure Drake's business reputation. On December 16, 1959, Drake gave notice to its employees and to the Shop Committee of the Union that its production employees need not work on the Thursday immediately preceding the holidays but would be expected to do so on the Saturday following them. Enough employees reported for work on the Saturday following Christmas to enable bakery products to be produced, but on the Saturday following New Year's Day only 26 out of 191 employees showed up. These were too few to engage in production and Drake was forced to close its plant on that important scheduled production date. Two days later, the present suit was filed, charging that the defendants had "instigated and encouraged" the members of the Union "to engage in a strike, a concerted stoppage, and/or cessation of services." Whether the Union breached the "no-strikes" clause and whether the rescheduling was permissible for the particular week involved we need not decide, since the only question before us is whether the District Court or an Arbitrator should determine whether the Union violated the "no-strikes" provision of the collective bargaining agreement.

The collective bargaining agreement contains provisions entitled "Grievance Procedure" (Article V), and "Arbitration" (Article VI) and "No-Strikes" (Article VII); they are set out in the margin.[2] Each article must be interpreted

---

[2] "ARTICLE V—GRIEVANCE PROCEDURE

(a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.

(b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be sub-

[fol. 51] with relation to the others. Article V requires an "attempt to adjust all complaints, disputes or grievances * * * involving questions of interpretation or application of [fol. 52] any * * * matter covered by this contract or any conduct or relation between the parties hereto, directly

---

mitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided.

ARTICLE VI—ARBITRATION

(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

(c) The decision of the Arbitrator shall be binding upon both parties for the duration of the contract.

(d) Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

(e) The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

ARTICLE VII—NO-STRIKES

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision.

(b) The parties agree as part of the consideration of this agreement that neither the International Union, the Local Union, or any of its officers, agents or members, shall be liable

or indirectly." This is broad language. But the second paragraph contains a very significant limitation: *"It is agreed that in the handling of grievances there shall be no interference with the conduct of the business."* [Italics added.] If grievances are not "adjusted" in accordance with Article V, "then either party shall have the right to refer the matter to arbitration as provided in Article VI." Article VII states very specifically that "There shall be no strike, boycott, interruption of work, stoppage, temporary walkout or lock-out for any reason," with one exception, namely, *"if either party shall fail to abide by the decision of the Arbitrator, after the receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision."* [Italics added.] In the case at bar no arbitrator has rendered a decision.

[fol. 53] Reading the three articles together, we think it clear that the arbitration provided for concerns only questions brought up through the Grievance Procedure; that Article VI sets forth the mechanics, not the scope, of the arbitration, the scope being set forth in Article V; and that a breach of Article VII is not within the scope of Article V. Moreover, the Union, although it made some objection to the employer's rescheduling of work on the Saturdays following the holidays, did not request the designation of an arbitrator, as provided in clause (a) of Article VI, but

---

for damages for unauthorized stoppage, strikes, intentional slowdowns or suspensions of work if:

(a) The Union gives written notice to the Company within twenty-four (24) hours of such action, copies of which shall be posted immediately by the Union on the bulletin board that it has not authorized the stoppage, strike, slowdown or suspension of work, and

(b) if the Union further cooperates with the Company in getting the employees to return and remain at work.

It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work stoppage, subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike or work stoppage."

resorted to the self-help of a strike in direct violation of the "no-strikes" provision of Article VII. Under these circumstances we hold that whether Article VII has been breached by an interruption of work or a temporary walk-out should be decided by the court having jurisdiction of the action brought under 29 U. S. C. A. §185(a), and that the order staying the action was erroneous.

In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, a union had entered into a collective bargaining agreement with an employer which provided that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure, the last step of which was arbitration. The employer having refused to arbitrate a grievance dispute, the union sued under §185 to compel arbitration. The Supreme Court, relying upon the legislative history of the statute, held that the District Court properly decreed specific performance of the agreement to arbitrate the grievance dispute. Mr. Justice Douglas' opinion states at page 455:

> "• • • plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation [§185] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy [fol. 54] that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

Even in the absence of a specific no-strike clause, it has been held that resorting to a strike instead of utilizing the contractual arbitration machinery prevents a union from claiming that the strike must be arbitrated.[3] Where the no-strike clause is as specific as in the case at bar, it seems clear that the parties intended the grievance-arbitration procedure to supplant strikes as a means of resolving

---

[3] *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, D. C. D. Mass., 129 F. Supp. 313, 315, aff'd, 1st Cir., 230 F. 2d 576; *Gay's Express Inc.* v. *International Brotherhood of Teamsters, Local No. 404*, D. C. D. Mass., 169 F. Supp. 834.

industrial disputes, but did not intend to subject alleged breaches of the no-strike clause to arbitration when a strike was resorted to before making any attempt to utilize the grievance-arbitration procedure.

Support for this conclusion is to be found in *Markel Electric Products, Inc.* v. *United Electrical Workers,* 2 Cir., 202 F. 2d 435, 437, which held that the alleged breach of the no-strike provision was not "within the scope" of an arbitration clause which we read as at least as broad as the one now before us. Our conclusion also accords with decisions in a number of other circuits.[4]

[fol. 55] The Union's brief relies almost exclusively on this court's decision in *Signal-Stat Corp.* v. *Local 475, United Elec. Workers,* 235 F. 2d 298, cert. denied, 354 U. S. 911. It should be noted, however, that *Signal-Stat* does not purport to overrule this court's earlier decision in *Markel,* but merely distinguished that case on the ground that the arbitration provision in *Signal-Stat* was broader. We think *Signal-Stat* distinguishable from the case at bar. There a dispute arose between the plaintiff employer and the defendant union concerning the discharge of two employees. The plaintiff's employees went on strike until it was eventually agreed that all employees, except the two discharged by the company, would return to work and the dispute over the discharged employees would be settled by arbitration. The plaintiff then brought its action for damages, charging a violation of the no-strike clause. That clause did not have the significant exception contained in

---

[4] *International Brotherhood of Teamsters, Local 25* v. *W. L. Mead, Inc.,* 1 Cir., 230 F. 2d 576; *Lodge No. 12, Dist. No. 37, IAM* v. *Cameron Iron Works, Inc.,* 5 Cir., 257 F. 2d 467, 471, cert. denied, 358 U. S. 880; *International Union, UAW* v. *Benton Harbor Malleable Industries,* 6 Cir., 242 F. 2d 536; *Hoover Motor Express Co.* v. *Teamsters Local No. 327,* 6 Cir., 217 F. 2d 49; *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union No. 34,* 7 Cir., 235 F. 2d 108. Also in accord are two decisions of the Fourth Circuit which were disapproved by this court in *Signal-Stat Corp.* v. *Local 475, United Elec. Workers,* 2 Cir., 235 F. 2d 298, cert. denied, 354 U. S. 911, discussed *infra.* See *United Elec. Workers* v. *Miller Metal Prods., Inc.,* 4 Cir., 215 F. 2d 221; *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co.,* 4 Cir., 168 F. 2d 33.

Drake's to the effect that a strike was permissible only if the other party had failed to abide by the decision of the Arbitrator after receipt of such decision. Moreover there, unlike the case at bar, the parties had already agreed to end the strike and to arbitrate the dispute which was the cause of the strike before the plaintiff brought suit. While *Signal-Stat* has frequently been cited and followed for other rules there enunciated,[5] our research reveals only two District Court cases in which it was relied upon to hold that an alleged breach of a no-strike clause is an arbitrable issue,[6] and only one other in which that part of the *Signal-*
[fol. 56] *Stat* opinion was cited with approval,[7] although several courts, in post *Signal-Stat* cases, have followed *Markel*.[8]

For the foregoing reasons we think it was error to stay the action. The order is reversed.

---

[5] E.g., Judge Learned Hand's opinion in *Council of Western Elec. Tech. Employees—Nat'l* v. *Western Elec. Co.*, 2 Cir., 238 F. 2d 892, 895.

[6] *Tenney Engineering, Inc.* v. *United Elec. Workers, Local No. 437*, D. C. D. N. J., 174 F. Supp. 878; *Armstrong-Norwalk Rubber Corp.* v. *Local No. 283, United Rubber Workers*, D. C. D. Conn., 167 F. Supp. 817.

[7] *Butte Miners' Union No. 1* v. *Anaconda Co.*, D. C. D. Mont., 159 F. Supp. 431.

[8] *Lodge No. 12, Dist. No. 37, IAM* v. *Cameron Iron Works, Inc.*, 5 Cir., *supra* note 4; *International Union, UAW* v. *Benton Harbor Malleable Industries*, 6 Cir., *supra* note 4; *Gay's Express, Inc.* v. *International Brotherhood of Teamsters, Local No. 404*, D. C. D. Mass., 169 F. Supp. 834; *Structural Steel & Ornamental Iron Ass'n* v. *Shopmens Local Union No. 545*, D. C. D. N. J., 172 F. Supp. 354. The conflict between *Structural Steel, supra*, and *Tenney Engineering, supra* note 6, has not yet been resolved by the Third Circuit.

[fol. 57]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DRAKE BAKERIES, INCORPORATED, Plaintiff-Appellant,

—v.—

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, Local 50, American Bakery and Confectionery Workers International, AFL-CIO, Defendants-Appellees.

JUDGMENT—February 17, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 58]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

MOTION OF INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE ON PETITION FOR REHEARING

Please take notice that, upon the annexed affidavit of Benjamin Rubenstein, duly sworn to the 2nd day of March

1961, the undersigned will move, at a motion part of this Court to be held at the United States Courthouse, Foley Square, New York, New York on the 6th day of March 1961 at 10:30 in the forenoon of that day or as soon thereafter as counsel may be heard for an order granting leave to International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO, by its attorneys Rubenstein & Rubenstein to file a brief in this case as amicus curiae.

Dated: New York, New York, March 2, 1961.

Rubenstein & Rubenstein, Attorneys for International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO.

To:

Messrs. Weil, Gotshal & Manges, Attorneys for Plaintiff-Appellant, 60 East 42nd Street, New York, New York.

Messrs. O'Dwyer & Bernstien, Attorneys for Defendant-Appellee, 40 Wall Street, New York, New York.

[fol. 59]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Benjamin Rubenstein, being duly sworn, deposes and says:

1. I am a member of the firm of Rubenstein & Rubenstein, attorneys for International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO, the present applicant for leave to file a brief in this case as amicus curiae. When I learned of the decision rendered herein I communicated with Howard

N. Meyer, Esq. of the firm of O'Dwyer & Bernstein to discuss it with him. When he informed me of his intention to petition for rehearing or for review en banc I requested that he send me a copy of his petition. I received today a galley proof thereof.

2. The applicant has an interest in this case inasmuch as the applicant is a labor organization amenable to suit under §301 of the Labor Management Relations Act and is presently defending several such suits, one of which is now pending in a District Court within this Circuit, the District Court of the District of Connecticut. In the Connecticut case the applicant may seek arbitration of the plaintiff's claim for damages for violation of collective bar- [fol. 60] gaining agreement, and the decision of the Connecticut District Court is likely to be governed by the ruling of this Court in the present matter.

3. Apart from the pending action in Connecticut, the applicant has an interest in this case because of the general effect it will have upon the law of labor relations throughout the country. It is respectfully submitted that the decision heretofore rendered by Judge Swan of this Court, unless set aside upon the pending application for rehearing or for review en banc, would have an adverse effect upon the conduct of labor relations throughout the jurisdiction of this Court and probably throughout the United States. It is further respectfully submitted that Judge Swan's opinion failed adequately to construe the language of the collective bargaining agreement before the Court in this case and misconstrued the tenor thereof in interpreting it in the light of the decisions of this Court in *Markel Electric Products Inc.* v. *United Electrical Workers*, 202 F. 2d 435 and *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 298, cert. denied 354 U. S. 911.

4. The petition of the Defendant-Appellee for rehearing or for review en banc argues that the decision in the *Signal-Stat* and *Markel* cases are "inconsistent" and that the decision by Judge Swan is inconsistent with *Signal-Stat*, which the Defendant-Appellee asserts to enunciate a rule of law preferable to that of the *Markel* case. It is the position of

the applicant that the discussion in this regard is inadequate in that arbitrability under collective bargaining agreements is in a sense a matter of interpretation of con-
[fol. 61] tractual language rather than wholly a question to be determined by the declaration of a broad policy in favor of or against the arbitration of certain types of disputes, and applicant has no reason to believe that argument on this point will be expanded and made complete by either of the parties to the appeal. If this argument is approved by this Court, it is likely that the prior decision, enunciated in Judge Swan's opinion, will be set aside and the lower court affirmed.

Benjamin Rubenstein

Sworn to before me this 2nd day of March 1961.

(Notary's signature illegible.)

[fol. 62]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REHEARING OR FOR REVIEW EN BANC—
Filed March 3, 1961

Comes now the defendant-appellee Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, and respectfully petitions for rehearing, or review *en banc* of the Court's decision of February 17, 1961, on the following grounds.

A.

The effect of the Court's decision herein will be to invite, in the District Courts in the Second Circuit, a flood of litigation, arising whenever an employer conceives that he has cause to claim conduct by a union member or members was in violation of a "no-strike" provision. We respectfully submit that such a result should be avoided, unless plainly compelled by the language of the statute and contract involved.

[fol. 63] B.

The Court unfortunately overlooked the last sentence of Article VII (quoted at end of footnote on p. 863 of slip opinion). This sentence provides that "disciplinary action * * * against any employee who engages in any unauthorized strike" is *"subject to the Union's right to submit to arbitration"*. Plainly it would require unequivocal language to impute to the parties the intention to submit some aspects of strikes during the contract term to arbitration, and other aspects of the very same strikes to civil actions!

The contract clearly evinces, in this last sentence of Article VII, an intention that "no-strike" disputes shall be arbitrated and we respectfully urge the Court to reconsider the matter and give effect to this expressed intention.[1]

C.

Neither the statute, nor the contract, make any provision for avoidance of the arbitration procedure, merely because it is Article VII, rather than some other Article of the agreement, that is in contention.

The arbitration clause "the scope" of which, as the Court correctly points out, includes "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract *or any act or conduct or relation between the parties hereto, directly or indirectly*" (italics added) has been severely curtailed by the Court's opinion. The meaning, intention, and effect of a subclause relied on by the Court ("It is agreed that in the handling of grievances there shall be no interference with the conduct of [fol. 64] the business") is, *under the very wording of the arbitration clause* for the arbitrators to decide, as a question "of interpretation or application".

The Court's reference to the quoted subclause was unexpected and reveals an entirely mistaken impression. The

---

[1] This last sentence of Art. VII is so clear that it might dispense with the necessity of reviewing the basic principle discussed below, subdivision "F" of this petition, pages 4-5 (now side folios 65-66).

fact is, as can be seen from its position in the subparagraph dealing with first step (in-shop) processing of grievances, that it was intended to refer to the situation where the meeting of the "duly designated committee and the Shop Chairman and the Employer" takes place *on the premises of the factory* as referred to in the first sentence of the second paragraph of Article V(a). It is clear from the context that the sole meaning of the words "no interference with the conduct of the business" is to avoid the calling of men from their machines while shop grievances are being discussed. Those words have no relationship whatsoever to the "scope" of arbitration, and were never intended to have any such effect.

Likewise, the Court's reference to, and reliance on, the proviso permitting a strike or lock-out when the other party has disobeyed an award is based on a misunderstanding. That proviso is intended *only* to provide an additional sanction for the *enforcement* of such awards. The proviso has no relationship with or reference to the scope of the arbitration clause. And in any event, its "interpretation or application," the parties expressly agreed, was for the arbitrators.

D.

The Court inadvertently states "the Union * * * did not request the designation of an Arbitrator" (slip opinion, p. 864). The fact is, and the record shows, that the Union could not, under the contract (Art. V, last sentence), request the designation of an arbitrator until the preliminary steps were exhausted, and the record is clear [fol. 65] that the preliminaries were being actively pressed when this action was brought. Following a wire by the Union ("IF YOU DO NOT RETRACT POSITION WE SHALL DEMAND ARBITRATION") there followed the submission, "in writing, and as a prelude to arbitration, its grievance as to the proper rate of pay for the employees who reported December 26" (Def. App. 15b).

The commencement of this action on January 4 was an attempt to frustrate arbitration under the contract before the necessary time period provided by the contract as a prerequisite had elapsed.

E.

The Court, on the record made by affidavits only, seems to pre-judge the merits of the controversy by saying the Union "resorted to the self-help of a strike in direct violation of the 'no-strikes' provision of Article VII" (slip opinion, p. 864). Whether Article VII was violated, either by the Union, or even by a group of employees without Union responsibility, is a matter that should remain for the tribunal which is to try the case, which should be the arbitral tribunal on which the parties agreed.

F.

While not in terms doing so, the effect of the Court's decision is to overrule *Signal Stat* v. *Local 475*, 235 F. 2d 298 (decided by a different panel), in which certiorari was denied, and on which a whole pattern of contract and collective bargaining relationships have been based over a period of years, throughout this entire Circuit.

We respectfully urge that the Court should not impose on the overworked District Judges the burden of fine-combing each of the hundreds of collective bargaining agreements that will come before them, as if they were trust [fol. 66] indentures or bills of lading. Every case taken to Court will involve a search for clues to see if the contract is closer to the one in *Signal Stat*, or to the one in this *Drake Bakeries* case. It will be an unrealistic search. There is no economic factor which is present in some contracts and absent in others which would make it logical that the Courts should strain to distinguish one contract from another in an effort to classify or analyze them on this point.

The real issue is a basic one of principle, namely, whether parties who have agreed to submit *all* disputes to arbitration should wake up and find that one segment of their area of dispute is nevertheless to be taken to Court contrary to their expectations. On this basic question of principle, candor compels us to say that *Signal Stat* is as inconsistent with *Markel* (202 F. 2d 435) as this Court's decision herein is inconsistent with *Signal Stat*. In *Markel*, however, the

Court quoted with approval from *International Union* v. *Colonial Hardwood Co.*, 168 F. 2d at page 35:

> "It would have been possible, of course, for the parties to provide for the arbitration of *any dispute which might arise between them;* but they did not do this * * *." (Emphasis supplied.)

We press upon the Court the proposition that in *this* case the parties *did* agree in Article V(a) to the arbitration of "any dispute which might arise between them" and that no clearer language could have been devised than the language quoted in footnote 2, page 861 of slip opinion herein!

The Court, *en banc,* should decide whether *Signal Stat* is to be, in effect, overruled.

Respectfully submitted,

O'Dwyer & Bernstien, Attorneys for Defendants-Appellees.

[fol. 67]

CERTIFICATE OF COUNSEL

I hereby certify that the above petition for rehearing is presented in good faith and not for purposes of delay.

Howard N. Meyer.

Dated, New York, New York, March 2, 1961.

[fol. 68]

UNITED STATES COURT OF APPEALS

2ND CIRCUIT

[Title omitted]

NOTICE OF MOTION OF NEW YORK STATE AFL-CIO FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF REHEARING

Sirs:

Please Take Notice that on the annexed petition of Herman A. Gray, verified the 10th day of March, 1961 and on

the record, briefs and other proceedings had herein, the undersigned will move this Court at a Term for motion to be held on the 16th day of March, 1961 for leave to be given to the New York State AFL-CIO to join in the petition for rehearing being filed by plaintiff-appellant and, in the event review en banc be granted for permission to file a brief in support of such review as *amicus curiae*.

Yours, etc.,

Herman A. Gray, 551 Fifth Avenue, New York 17, N. Y., Counsel to the New York State AFL-CIO.

To:

O'Dwyer & Bernstien, 40 Wall Street, New York 5, New York, Attorneys for Defendant-Appellee.

Weil, Gotshal & Manges, 60 East 42nd Street, New York, N. Y., Attorneys for Plaintiff-Appellant.

[fol. 69]

No. 26,343

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

PETITION OF HERMAN A. GRAY ON BEHALF OF THE NEW YORK STATE AFL-CIO TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner, Herman A. Gray, respectfully shows:

1. Your petitioner, an attorney-at-law duly admitted to practice before the courts of the State of New York and before this court, makes this application on behalf of the New York State AFL-CIO for leave to file a brief in this action as *amicus curiae* in support of the Defendant-Appellee's application for a stay of this action and for arbitration.

2. The New York State AFL-CIO is an unincorporated association of labor unions operating in New York State. There are over two thousand such unions affiliated with the New York State AFL-CIO with a total membership in excess of two and one-half million workers.

3. While the State AFL-CIO does itself not engage in collective bargaining, one of its principal objectives is to promote collective bargaining and to safeguard the collective labor agreement as the means best suited for the [fol. 70] successful ordering of labor relations in a free economy and a democratic society.

4. The officers of the State AFL-CIO are profoundly disturbed by the decision rendered in this action which holds that the dispute between the parties is not subject to arbitration. It is generally accepted that both from the point of view of employers and the unions arbitration is the simplest, most direct and most effective way of disposing of disputes that arise between them. Court procedures were not developed with a view to dealing with labor relations and litigation not only entails needless delays and expense but usually engenders bitterness which makes it difficult, sometimes impossible, for the parties successfully to live and work together thereafter.

5. The President of the State AFL-CIO spoke to Judge Edward C. Maguire and to your petitioner about this situation. At one time Judge Maguire served as the head of New York City's Department of Labor, a Department devoted exclusively to the task of conciliating labor disputes, and he has for many years dealt with labor relations. Your petitioner teaches the law of labor relations at New York University and has likewise for many years been active in this field, primarily as arbitrator under collective labor agreements.

6. Both Judge Maguire and your petitioner advised the President that the decision here under question runs counter to the steady progress which has been made in the courts in giving increasingly fuller scope to the arbitration provisions contained in collective agreements, that if it

stands it will produce fresh uncertainties and is certain to have a damaging effect on the administration of collective agreements. At the President's request, Judge Maguire and your petitioner have agreed to prepare and submit to [fol. 71] this Court a brief *amicus curiae* on behalf of the New York State AFL-CIO if permission to do so were obtained.

Wherefore, your petitioner respectfully prays this Court that the New York State AFL-CIO be permitted to file a brief as *amicus curiae.*

Dated, New York, March 10, 1961.

Herman A. Gray, Petitioner.

State of New York,
County of New York, ss.:

Herman A. Gray, the petitioner named in the foregoing petition, being duly sworn, deposes and says that he has read the foregoing petition subscribed by him and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to this 10th day of March, 1961.

Jean Grant, Notary Public, State of New York, No. 41-6626900, Queens County.

[fol. 72]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING IN BANC—
March 28, 1961

O'Dwyer & Bernstien, New York, N. Y., for defendants-appellees.

Petition for rehearing is denied.

J. E. L., T. W. S., L. P. M., U.S. C. JJ.

All of the active judges concurring, the petition for rehearing in banc is granted. The case will be considered on the briefs unless otherwise ordered.

The motion of International Union, United Automobile Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO to file a brief as amicus curiae is granted and said brief, not to exceed 25 pages, is ordered to be filed within 15 days from the date of this order.

The motion of New York State AFL-CIO for leave to file a brief as amicus curiae is granted, and said brief, not to exceed 25 pages, is ordered to be filed within 15 days from the date of this order.

Plaintiff-appellant, Drake Bakeries Incorporated, is granted leave to file a reply brief within 15 days of the filing of the amici curiae briefs.

J. E. L., Chief Judge.

March 28, 1961.

[fol. 73]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

ORDER GRANTING PETITION FOR REHEARING IN BANC—
March 28, 1961

A petition for rehearing in banc having been filed herein by counsel for the appellees and motions having been made by counsel for the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO and New York State AFL-CIO for leave to file briefs amicus curiae,

Upon consideration thereof, it is

Ordered that the petition for rehearing in banc be and it hereby is granted.

Further ordered that the motions of the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO and the New York State AFL-CIO for leave to file briefs amicus curiae be and they hereby are granted and that each may file a brief amicus curiae not to exceed 25 pages on or before April 12, 1961.

Further ordered that the appellant may file an answering brief within fifteen days of the filing of the briefs amici curiae.

A. Daniel Fusaro, Clerk.

[fol. 74]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—October Term, 1960.

(Submitted April 25, 1961)

Docket No. 26343

DRAKE BAKERIES INCORPORATED, Plaintiff-Appellant,

—v.—

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendant-Appellee.

Before: Lumbard, Chief Judge, Clark, Waterman, Moore, Friendly and Smith, Circuit Judges.

Weil, Gotshal & Manges, New York, N. Y. (Robert Abelow, Milton Haselkorn and Marshall C. Berger, on the brief) for plaintiff-appellant.

[fol. 75] O'Dwyer & Bernstien, New York, N. Y. (Howard N. Meyer, on the brief) for defendant-appellee.

Rubenstein & Rubenstein, New York, N. Y. (Jerome S. Rubenstein, on the brief) for International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO, amicus curiae.

Edward Maguire and Herman A. Gray, New York, N. Y., for New York State AFL-CIO, amicus curiae.

PER CURIAM OPINION IN REHEARING—September 12, 1961

PER CURIAM:

This case was submitted to and considered by the active judges of this court after a majority of them had voted to

grant the appellee's motion for rehearing in banc. Judges Clark, Waterman and Smith vote to affirm the order of the District Court for the Southern District of New York, reported at —— Fed. Supp. ——. They point to the three recent decisions of the Supreme Court in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). Judges Lumbard, Moore and Friendly, not considering these decisions to be controlling, agree with the views of a panel of this court as expressed in an opinion written by Judge Swan and reported at 287 F. 2d 155 (1961) which reversed the order of the District Court. [fol. 76] Four judges are of the view that under such circumstances the order of the District Court is affirmed. Judges Lumbard and Friendly dissent and are of the opinion that under such circumstances the opinion of a panel of this court, reported at 287 F. 2d 155, remains in effect and should not be withdrawn.

Accordingly the opinion reported at 287 F. 2d 155 is withdrawn and the order of the District Court is affirmed.

[fol. 77]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

ORDER WITHDRAWING OPINION, VACATING JUDGMENT AND DIRECTING ENTRY OF NEW JUDGMENT—Sept. 12, 1961

A petition for rehearing in banc having been granted, supplemental briefs having been filed and the court having taken the action under further advisement,

Upon consideration thereof, it is

Ordered that the opinion of the court, dated February 17, 1961, be and it hereby is withdrawn.

Further ordered that the judgment of this court, dated February 17, 1961, be and it hereby is vacated and that a judgment be entered on the opinion of this court rendered September 12, 1961.

A. Daniel Fusaro, Clerk.

[fol. 78]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

DRAKE BAKERIES, INCORPORATED, Plaintiff-Appellant,

—v.—

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, Local 50, American Bakery and Confectionery Workers International, AFL-CIO, Defendants-Appellees.

JUDGMENT—Sept. 12, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro, Clerk.

[fol. 79] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 80]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 22, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following Nos. 430 and 434.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 598

Supreme Court of the United States

OCTOBER TERM, 1961

DRAKE BAKERIES INCORPORATED,
Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HORACE S. MANGES,
Attorney for Petitioner,
60 East 42nd Street,
New York 17, N. Y.

Of Counsel:

ROBERT ABELOW,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES.

INDEX

TABLE OF AUTHORITIES

Supreme Court of the United States

OCTOBER TERM, 1961

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DRAKE BAKERIES INCORPORATED prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on September 12, 1961.

Citation to Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 196 F. Supp. 148 and is printed in Appendix A hereto, *infra,* p. 1a. The original opinion of the United States Court of Appeals is reported in 287 F. 2d 155 and is printed in Appendix B hereto *infra,* p. 4a. The opinion of the United States Court of Appeals for the Second Circuit upo. re-argument *en banc* is reported in 294 F. 2d 399 and is printed in Appendix C hereto *infra,* p. 13a.

Jurisdiction

The judgment of the Court of Appeals was entered on September 12, 1961.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

Questions Presented

1. Were respondents entitled to have petitioner's action, brought under Section 301(a) of the Labor Management Relations Act of 1947 for violation of a no-strike clause contained in the collective bargaining agreement between the parties, stayed pending arbitration?

2. Did the even division of the active Judges in the Second Circuit upon reargument *en banc* affirm the original decision of the Court of Appeals for the Second Circuit or the decision of the District Court for the Southern District of New York?

Statute Involved

Section 301(a), Labor Management Relations Act of 1947; 29 USC §185(a), 61 Stat. 156:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement

Respondent Local 50, American Bakery & Confectionery Workers International AFL-CIO (hereinafter referred to as the "Union") is the collective bargaining representative for certain employees of Petitioner Drake Bakeries Incorporated (hereinafter referred to as "Drake").

Drake and the Union are parties to a collective bargaining agreement regulating their respective rights and obligations. This collective bargaining agreement includes the following pertinent provisions setting forth the grievance and arbitration machinery:

> "ARTICLE V—GRIEVANCE PROCEDURE
>
> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.
>
> In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.
>
> (b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is

reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided.

"ARTICLE VI—ARBITRATION

(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

(c) The decision of the Arbitrator shall be binding upon both parties for the duration of this contract.

(d) Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

(e) The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties."

A specific no-strike clause was also contained in the collective bargaining agreement:

"ARTICLE VII—NO STRIKES

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lockout for any reason during the terms of this contract, except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision."

On December 16, 1959 Drake announced to the Union Committee and to its employees that in order to meet competition it was scheduling production for the Saturday after Christmas, December 26, 1959, and the Saturday after New Year's Day, January 2, 1960. Despite the fact that the company clearly had the right to reschedule production, both as an inherent management prerogative and specifically under the collective bargaining agreement, the Union objected to the rescheduling. Instead of utilizing the grievance machinery available to it under the collective bargaining agreement, the Union chose to cause its members to engage in a one-day strike on January 2, 1960 in violation of both the no-strike clause of the contract and the grievance and arbitration machinery provided for in the contract.

Drake instituted this action under Section 301 in the United States District Court for the Southern District of New York seeking damages for that breach of the no-strike clause. The Union made a motion to stay the proceedings herein pending arbitration. This motion was granted by Chief Judge Sylvester Ryan in an opinion contained in Appendix A *infra*, p. 1a. Drake appealed to the United States Court of Appeals for the Second Circuit.

A panel consisting of Judges Swan, Lumbard and Moore unanimously decided that the breach of the no-strike clause was not covered by the arbitration clause of the contract and, hence, the Union's motion for a stay was improperly granted. The opinion of Judge Swan is contained in Appendix B *infra*, p. 4a.

The Court of Appeals for the Second Circuit granted the Union's motion for reargument *en banc*. Upon such reargument, the six active judges of the Second Circuit were evenly divided, Judges Lumbard, Moore and Friendly voting to sustain the original determination of the Court of Appeals and Judges Clark, Waterman and Smith voting to reverse that determination and restore the District Court decision. The entire Court, by a 4 to 2 vote, then determined that the effect of this evenly divided Court was to affirm the District Court opinion rather than the original Court of Appeals decision.

Basis of Jurisdiction of Federal Courts

The basis of jurisdiction of the United States District Court for the Southern District of New York is Section 301(a) of the Labor Management Relations Act of 1947, quoted in full text *supra*, p. 2.

Reasons for Granting the Writ

1. The first question presented is important in the administration of Federal law.

This case concerns the relationship of the two most important clauses in any collective bargaining agreement—the arbitration clause and the no-strike clause. As this Court stated in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 454, 455 (1957), and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574,

578, footnote 4 (1960), the no-strike clause is the consideration the employer receives for accepting an arbitration clause. Indeed, the no-strike clause is the only benefit which the employer receives from a collective bargaining agreement. Senate Report No. 150, 80th Congress, First Session, page 60.

Not only are the clauses in question the most important clauses in any collective bargaining agreement but their violation by a union jeopardizes the entire fabric of industrial peace between a particular employer and a particular union. It may be safely stated that a strike in violation of a no-strike clause by itself creates the most serious situation in labor-management relations. This case raises the question of whether a union which has ignored the grievance and arbitration clauses of a collective bargaining agreement and broken the no-strike clause, can then avail itself of the arbitration clause which it has thereby violated to prevent the judicial redress provided by Section 301 for that very violation.

The importance of this issue can also be seen by the large number of cases in the Federal courts considering the question. We will summarize the prior adjudications of this issue in Point 2 *infra*. Here we need only state that the Courts of Appeal for the First, Second, Fourth, Fifth, Sixth and Seventh Circuits and numerous District Courts have considered and passed upon this issue. The number of cases concerning this issue illustrates both the importance of the problem to unions and employers, and the frequency with which litigation on this issue arises. As a result, it becomes desirable for this Court to resolve the issue once and for all, so that not only can the Courts of Appeal and the District Courts decide this important issue uniformly but also, so that both unions and employers may know the consequences of violations of the all important no-strike clause.

2. The decision of the Second Circuit is in conflict with the decisions of the First, Fourth, Fifth, Sixth and Seventh Circuits, and District Courts in the Third Circuit.

In its original opinion the Second Circuit set forth the authority for denying a stay pending arbitration for a Section 301 action for violation of a no-strike clause, as follows:

> "Support for this conclusion is to be found in Markel Electric Products, Inc. *v.* United Electrical, Radio & Machine Workers, 2 Cir., 202 F. 2d 435, 437, which held that the alleged breach of the no-strike provision was not 'within the scope' of an arbitration clause which we read as at least as broad as the one now before us. Our conclusion also accords with decisions in a number of other circuits.[4]

4. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 25* v. *W. L. Mead, Inc.*, 1 Cir., 230 F. 2d 576; *Lodge No. 12, Dist. No. 37, I.A.M.* v. *Cameron Iron Works, Inc.*, 5 Cir., 257 F. 2d 467, 471, certiorari denied, 358 U. S. 880, 79 S. Ct. 120, 3 L. Ed. 2d 110; *International Union United Auto Aircraft* v. *Benton Harbor Malleable Industries*, 6 Cir., 242 F. 2d 536; *Hoover Motor Express Co.* v. *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union No. 327*, 6 Cir., 217 F. 2d 49; *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union No. 34*, 7 Cir., 235 F. 2d 108. Also in accord are two decisions of the Fourth Circuit which were disapproved by this court in *Signal-Stat Corp.* v. *Local 475, United Electrical, Radio and Machine Workers*, 2 Cir., 235 F. 2d 298, certiorari denied, 354 U. S. 911, 77 S. 1293, 1 L. Ed. 2d 1428, discussed *infra*. See *United Electrical, Radio and Machine Workers* v. *Miller Metal Products, Inc.*, 4 Cir., 215 F. 2d 221; *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co.*, 4 Cir., 168 F. 2d 33."

The Court then went on to discuss an earlier case in the Second Circuit, *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 298 (2 Cir., 1956) *cert. denied*, 354 U. S. 911 (1957), in which a 301 action for breach of a no-strike clause was stayed pending arbitration. After distinguishing that

case on its facts, the court went on to consider the treatment of the *Signal-Stat* case in other Federal courts as contrasted with the treatment of another Second Circuit case, *Markel Electric Products, Inc.* v. *United Electrical Workers*, 202 F. 2d 435 (2 Cir., 1953) in which a 301 action for breach of no-strike clause was not stayed.

> "While Signal-Stat has frequently been cited and followed for other rules there enunciated,[5] our research reveals only two District Court cases in which it was relied upon to hold that an alleged breach of a no-strike clause is an arbitrable issue,[6] and only one other in which that part of the Signal-Stat opinion was cited with approval,[7] although several courts, in post Signal-Stat cases, have followed Markel.[8]

5. E. g., Judge Learned Hand's opinion in *Council of Western Electric Technical Employees—National* v. *Western Electric Co.*, 2 Cir., 238 F. 2d 892, 895.

6. *Tenney Engineering, Inc.* v. *United Electrical, Radio and Machine Workers of America, Local 437, D.C.D.N.J.*, 174 F. Supp. 878; *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283, United Rubber Cork, Linoleum and Plastic Workers, D.C.D. Conn.*, 167 F. Supp. 817.

7. *Butte Miners' Union No. 1 of International Union of Mine, Mill and Smelter Workers* v. *Anaconda Co., D.C.D. Mont.*, 159 F. Supp. 431.

8. *Lodge No. 12, Dist. No. 37, I. A. M.* v. *Cameron Iron Works, Inc.*, 5 Cir., *supra*, note 4; *International Union, United Auto Aircraft* v. *Benton Harbor Malleable Industries*, 6 Cir., *supra*, note 4; *Gay's Express, Inc.* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local No. 404 D.C.D. Mass.*, 169 F. Supp. 834; *Structural Steel & Ornamental Iron Ass'n* v. *Shopmens' Local Union No. 545, D.C.D.N.J.*, 172 F. Supp. 354. The conflict between *Structural Steel, supra*, and *Tenney Engineering, supra*, note 6, has not yet been resolved by the Third Circuit."

In addition to the cases cited by the Second Circuit, there have been two other decisions by District Courts in the Third Circuit prior to the original decision herein denying a stay pending arbitration in actions for breaches

of a no-strike clause. *Harris Hub Bed & Spring Co.* v. *United Electrical Workers,* 121 F. Supp. 40 (M. D. Pa. 1954) and *Metal Polishers* v. *Rubin,* 85 F. Supp. 363 (E. D. Pa. 1949).

But further, after the original decision was issued and before it was withdrawn by the decision *en banc,* it was specifically cited and followed by two different Courts of Appeals and a District Court in still another Circuit. *Vulcan-Cincinnati, Inc.* v. *United Steelworkers,* 289 F. 2d 103 (6th Cir. 1961); *Sinclair Refining Co.* v. *Atkinson,* 290 F. 2d 312 (7th Cir. 1961), *petition for writ of certiorari pending; Yale & Towne Mfg. Co.* v. *Local Lodge No. 1717,* 194 F. Supp. 285 (E.D. Pa. 1961), *appeal to Third Circuit pending.*

Thus, when the Court of Appeals withdrew its original decision and reinstated the District Court decision it conflicted with the decisions of the First, Fourth, Fifth, Sixth and Seventh Circuits and the decisions of four different District Court Judges in the Third Circuit holding the breach of a no-strike clause to be not arbitrable.

The decision of the Second Circuit withdrawing the original opinion merely states that the Judges in favor of withdrawal "point to the three recent decisions of the Supreme Court in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 1960, 363 U. S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; *United Steelworkers of America* v. *American Mfg. Co.,* 1960, 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 1960, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424."

First we submit that the *Steelworkers* cases support Drake's contentions. They demonstrate the uniquely critical importance of a no-strike clause and hence the necessity for providing judicial redress for its violation. See

United Steelworkers v. *Warrior & Gulf Navigation Co., supra.* Indeed, as we will demonstrate in Point 3 *infra, United Steelworkers* v. *American Mfg.* itself specifically upholds Drake's position by citing with approval a case sustaining that position.

But even if we accept the point of view of these three Judges and consider that the three *Steelworkers* cases rendered all prior decisions obsolete and hence inapplicable, there still remains a split between the Circuits. In all three decisions on this issue which have been decided since this Court's determinations in the *Steelworkers* cases (other than the instant case), the courts have specifically considered the *Steelworkers* cases and have held that they do not change the rule prevailing in the overwhelming majority of circuits which have considered the issue that actions for violations of a no-strike clause cannot be stayed pending arbitration. *Vulcan-Cincinnati, Inc.* v. *United Steelworkers, supra, Sinclair Refining Co.* v. *Atkinson, supra, Yale & Towne Mfg. Co.* v. *Local Lodge No. 1717, supra.* Thus, even if we were to consider only the cases decided after the *Steelworkers* cases as pertinent, the decision herein withdrawing the original opinion is in conflict with decisions of the Sixth and Seventh Circuits and the Eastern District of Pennsylvania.

We should point out that the decision in the other Circuits rests on a variety of rationales. Some rest on the scope of the arbitration clause. See, *e.g., Vulcan-Cincinnati, Inc.* v. *United Steelworkers, supra; Sinclair Refining Co.* v. *Atkinson, supra; United Furniture Workers* v. *Colonial Hardwood Flooring Co.*, 168 F. 2d 33 (4th Cir. 1948). Others state that a strike in violation of a no-strike clause is so inconsistent with the grievance and arbitration machinery that a union should not be permitted to invoke the machinery it heretofore flouted to

prevent redress for that violation. See *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union*, 235 F. 2d 108 (7th Cir.), *cert. denied*, 352 U. S. 912 (1956); *Gay's Express, Inc.* v. *International Brotherhood of Teamsters*, 169 F. Supp. 834 (D. Mass. 1959); *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, 129 F. Supp. 313 (D. Mass. 1955), *aff'd*, 230 F. 2d 576 (1st Cir. 1956). Still other cases hold breaches of no-strike clause to be not arbitrable without explicitly adopting either rationale. *Lodge No. 12* v. *Cameron Iron Works, Inc.*, 257 F. 2d 457 (5th Cir.), *cert. denied*, 358 U. S. 880 (1958); *Structural Steel & Ornamental Iron Association* v. *Shopmen's Local Union No. 545*, 172 F. Supp. 354 (D. N. J. 1959). In any event, whichever rationale was followed each of these decisions reached a contrary result from that of the Second Circuit in the instant case.

3. The decision of the Second Circuit conflicts with a prior decision of this Court.

In *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567, footnote 4 (1960), this Court cited with approval the treatment of a violation of a no-strike clause in the opinion of the District Court of New Jersey in *Structural Steel & Ornamental Iron Association* v. *Shopmens' Local Union No. 545*, 172 F. Supp. 354 (D. N. J. 1959). In that opinion the Court refused to stay such an action pending arbitration. Thus the decision of the Second Circuit herein is in direct conflict with that of the *Structural Steel* case, which was specifically approved by this Court.

4. The second question presented is important to the Courts of Appeals in the administration of their judicial business.

This Court has never determined the effect of an even division in a Court of Appeals upon reargument *en banc*. It can be argued that such an equal division affirms the original decision of that Court of Appeals since the Court *en banc* was merely considering whether the original decision should stand on reargument. This apparently was the thinking of two of the six active Judges of the Second Circuit. This question is likely to arise in the future and thus should be resolved by this Court so that the Court of Appeals can handle such situations uniformly.

This Court has previously granted certiorari in other cases involving the procedures in determinations by Courts of Appeals *en banc*. *United States* v. *American-Foreign S.S. Corp.*, 363 U. S. 685 (1960); *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U. S. 247 (1953).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

HORACE S. MANGES,
Attorney for Petitioner,
60 East 42nd Street,
New York 17, N. Y.

Of Counsel:

ROBERT ABELOW,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES.

Appendix A

DRAKE BAKERIES INCORPORATED

v.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, and Louis Genuth, Secy. Treas. etc.

United States District Court
S. D. New York.
May 4, 1960.

Weil, Gotshal & Manges, New York City, for plaintiff (Robert Abelow, New York City, of counsel).

O'Dwyer & Bernstein, New York City, for defendant (Howard N. Meyer, New York City, of counsel).

RYAN, Chief Judge.

On January 4, 1960, the plaintiff Drake Bakeries, Incorporated, instituted this suit to recover damages for an alleged breach of the "no-strike provision" of a collective bargaining agreement, pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C.A. § 185.

Prior to interposing an answer to the complaint, defendant moves this Court, under Section 3 of the United States Arbitration Act, 9 U.S.C.A. § 3, for a stay of trial pending an arbitration proceeding in accordance with the terms of the collective bargaining agreement. That the Court has jurisdiction and power to enforce the arbitration clause of this contract is established now by Textile Workers v. Lincoln Mills of Alabama, 1957, 353 U. S. 448, 77 S.Ct. 912, 923, 1 L.Ed.2d 372.

Appendix A

The basic grounds upon which plaintiff opposes this application may briefly be summarized as follows: (1) The arbitration provision of the agreement is at best permissive and not mandatory; (2) The action of the union in striking in the face of the no-strike clause (Art. VII of the agreement) acted as a waiver of its rights under the grievance and arbitration provisions; (3) By failure to proceed to arbitration the defendants expressly waived their arbitration rights.

We find no merit in these contentions.

1. A reading of the provisions governing arbitration (Articles 5 and 6) shows that *all* complaints, disputes or grievances *shall* be submitted to arbitration. We find nothing permissive there and hold that this dispute is to be arbitrated.

2. Plaintiff next contends that, even if arbitration be mandatory, by violating one clause of the agreement defendants waived their rights under another clause (arbitration). We can find no logical basis for this argument, since if this premise were sustained, every violation of a collective bargaining agreement would act as a waiver of the violating party's right to arbitration, and this would destroy all arbitration agreements which are looked upon with great favor. Markel Electric Products, Inc., v. United Electrical, Radio & Machine Workers et al., 2 Cir., 202 F.2d 435. Aside from the purely logical objection to plaintiff's contention, it appears that the better reasoned decisions allow arbitration after a violation of a no-strike provision. Signal-Stat Corp. v. Local 475, etc., 235 F.2d 298, certiorari denied 354 U.S. 911, 77 S.Ct. 1293, 1

L.Ed.2d 1428; Lewittes & Sons, v. United Furniture Workers, 95 F.Supp. 851.

3. We come then to plaintiff's final contention that the union's failure to proceed to arbitration constitutes a default on the union's part and thus the union has waived its right under the arbitration provision. Since plaintiff was and is the aggrieved party and since there is no evidence before the Court that plaintiff ever attempted to proceed to arbitration by a written demand as required by Article V, Section 6 of the agreement, defendants' failure to initiate arbitration does not amount to a waiver under the circumstances.

We conclude that the arbitration agreement must be enforced and direct that an order be settled staying further proceedings in this suit.

Settle order on notice.

Appendix B

DRAKE BAKERIES, INCORPORATED,
Plaintiff-Appellant,

v.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,
Defendant-Appellee.

No. 99, Docket 26343.

United States Court of Appeals
Second Circuit.

Argued Dec. 13, 1960.

Decided Feb. 17, 1961.

Robert Abelow, of Weil, Gotshal & Manges, New York City, for plaintiff-appellant.

Howard N. Meyer, of O'Dwyer & Bernstein, New York City, for defendant-appellee.

Before LUMBARD, Chief Judge, and SWAN and MOORE, Circuit Judges.

SWAN, Circuit Judge.

This is an appeal by plaintiff, referred to herein as Drake, from an order entered in an action filed in the court below on January 4, 1960. The action was brought pursuant to § 301(a) of the Labor-Management Relations Act, 29 U.S.C.A. § 185 (a), to recover damages for breach of a "no-strikes" provision in a collective bargaining agree-

ment between plaintiff and defendant, Local 50, referred to herein as the Union.[1] Before answering the complaint the Union moved under section 3 of the Arbitration Act, 9 U.S.C.A. § 3, to stay all proceedings in the action until arbitration was had in accordance with the terms of an arbitration provision in the collective bargaining agreement. From the order granting this motion Drake has appealed.

The affidavits in support of, and in opposition to, the motion raise no dispute as to the facts which brought the alleged strike that caused Drake to bring its action. Drake is engaged in the production and sale of cake. During the winter of 1959-1960, Christmas and New Year's Day fell on Friday. If Drake's cake was baked on the Thursday before Christmas or New Year's and sold on the Monday following these holidays it would not be fresh. This would impair Drake's competitive position with concerns which did produce cake on the Saturdays following the holidays and would injure Drake's business reputation.

---

1. Section 185(a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Subsection (b) deals with the responsibility of labor organizations and employers for the acts of their agents, declares a labor organization an entity for purposes of suit, and provides for the enforcement of money judgments against labor organizations. Subsection (c) although framed in terms of "jurisdiction," deals with venue. Subsection (d) deals with service of process on labor organizations. Subsection (e) deals with determination of the question of agency.

Appendix B

On December 16, 1959, Drake gave notice to its employees and to the Shop Committee of the Union that its production employees need not work on the Thursday immediately preceding the holidays but would be expected to do so on the Saturday following them. Enough employees reported for work on the Saturday following Christmas to enable bakery products to be produced, but on the Saturday following New Year's Day only 26 out of 191 employees showed up. These were too few to engage in production and Drake was forced to close its plant on that important scheduled production date. Two days later, the present suit was filed, charging that the defendants had "instigated and encouraged" the members of the Union "to engage in a strike, a concerted stoppage, and/or cessation of services." Whether the Union breached the "no-strikes" clause and whether the rescheduling was permissible for the particular week involved we need not decide, since the only question before us is whether the District Court or an Arbitrator should determine whether the Union violated the "no-strikes" provision of the collective bargaining agreement.

The collective bargaining agreement contains provisions entitled "Grievance Procedure" (Article V), and "Arbitration" (Article VI) and "No-Strikes" (Article VII); they are set out in the margin.[2] Each article must be inter-

2. "Article V—Grievance Procedure

"(a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

"In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and

the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.

"(b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided.

"Article VI—Arbitration.

"(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

"(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

"(c) The decision of the Arbitrator shall be binding upon both parties for the duration of the contract.

"(d) Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

"(e) The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

"Article VII—No-Strikes

"(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision.

preted with relation to the others. Article V requires an "attempt to adjust all complaints, disputes or grievances • • involving questions of interpretation or application of any • • • matter covered by this contract or any conduct or relation between the parties hereto, directly or indirectly." This is broad language. But the second paragraph contains a very significant limitation: *"It is agreed that in the handling of grievances there shall be no interference with the conduct of the business."* [Italics added.] If grievances are not "adjusted" in accordance with Article V, "then either party shall have the right to refer the matter to arbitration as provided in Article VI." Article VII states very specifically that "There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason," with one exception, namely, *"if either party shall fail to abide by the decision of the Arbitrator, after the receipt of such decision, under Article 6 of this contract, then the other party shall not be bound*

"(b) The parties agree as part of the consideration of this agreement that neither the International Union, the Local Union, or any of its officers, agents or members, shall be liable for damages for unauthorized stoppage, strikes, intentional slowdowns or suspensions of work if:

"(a) The Union gives written notice to the Company within twenty-four (24) hours of such action, copies of which shall be posted immediately by the Union on the bulletin board that it has not authorized the stoppage, strike, slowdown or suspension of work, and

"(b) if the Union further cooperates with the Company in getting the employees to to return and remain at work.

"It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work stoppage, subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike or work stoppage."

by this provision." [Italics added.] In the case at bar no arbitrator has rendered a decision.

Reading the three articles together, we think it clear that the arbitration provided for concerns only questions brought up through the Grievance Procedure; that Article VI sets forth the mechanics, not the scope, of the arbitration, the scope being set forth in Article V; and that a breach of Article VII is not within the scope of Article V. Moreover, the Union, although it made some objection to the employer's rescheduling of work on the Saturdays following the holidays, did not request the designation of an arbitrator, as provided in clause (a) of Article VI, but resorted to the self-help of a strike in direct violation of the "no-strikes" provision of Article VII. Under these circumstances we hold that whether Article VII has been breached by an interruption of work or a temporary walk-out should be decided by the court having jurisdiction of the action brought under 29 U.S.C.A. § 185 (a), and that the order staying the action was erroneous.

In Textile Workers Union of America v. Lincoln Mills, of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972, a union had entered into a collective bargaining agreement with an employer which provided that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure, the last step of which was arbitration. The employer having refused to arbitrate a grievance dispute, the union sued under § 185 to compel arbitration. The Supreme Court, relying upon the legislative history of the statute, held that the District Court properly decree specific performance of the agreement to arbitrate the grievance dispute. Mr.

Appendix B

Justice Douglas' opinion states at page 455 of 353 U.S., at page 917 of 77 S.Ct.:

> "• • • plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation [§ 185] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

Even in the absence of a specific no-strike clause, it has been held that resorting to a strike instead of utilizing the contractual arbitration machinery prevents a union from claiming that the strike must be arbitrated.[3] Where the no-strike clause is as specific as in the case at bar, it seems clear that the parties intended the grievance-arbitration procedure to supplant strikes as a means of resolving industrial disputes, but did not intend to subject alleged breaches of the no-strike clause to arbitration when a strike was resorted to before making any attempt to utilize the grievance-arbitration procedure.

Support for this conclusion is to be found in Markel Electric Products, Inc. v. United Electrical, Radio & Machine Workers, 2 Cir., 202 F.2d 435, 437, which held that the alleged breach of the no-strike provision was not "within the scope" of an arbitration clause which we read as at least as broad as the one now before us. Our con-

3. W. L. Mead, Inc. v. International Brotherhood of Teamsters, D.C.D.Mass., 129 F.Supp. 313, 315, affirmed 1 Cir., 230 F. 2d 576; Gay's Express, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 404, D.C.D.Mass., 169 F.Supp. 834.

clusion also accords with decisions in a number of other circuits.[4]

The Union's brief relies almost exclusively on this court's decision in Signal-Stat Corp. v. Local 475, United Electrical, Radio and Machine Workers, 2 Cir., 235 F.2d 298, certiorari denied, 354 U.S. 911, 77 S.Ct. 1293, 1 L.Ed.2d 1428. It should be noted, however, that Signal-Stat does not purport to overrule this court's earlier decision in Markel, but merely distinguished that case on the ground that the arbitration provision in Signal-Stat was broader. We think Signal-Stat distinguishable from the case at bar. There a dispute arose between the plaintiff employer and the defendant union concerning the discharge of two employees. The plaintiff's employees went on strike until it was eventually agreed that all employees, except the two discharged by the company, would return to work and the dispute over the discharged employees would be settled by arbitration. The plaintiff then brought its action for damages, charging a violation of the no-

4. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 25 v. W. L. Mead, Inc., 1 Cir., 230 F.2d 576; Lodge No. 12, Dist. No. 37, I.A.M. v. Cameron Iron Works, Inc., 5 Cir., 257 F.2d 467, 471, certiorari denied, 358 U.S. 880, 79 S.Ct. 120, 3 L.Ed.2d 110; International Union United Auto Aircraft v. Benton Harbor Malleable Industries, 6 Cir., 242 F.2d 536; Hoover Motor Express Co. v. Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union No. 327, 6 Cir., 217 F.2d 49; Cuneo Press, Inc. v. Kokomo Paper Handlers' Union No. 34, 7 Cir., 235 F. 2d 108. Also in accord are two decisions of the Fourth Circuit which were disapproved by this court in Signal-Stat Corp. v. Local 475, United Electrical, Radio and Machine Workers, 2 Cir., 235 F.2d 298, certiorari denied, 354 U.S. 911, 77 S.Ct. 1293, 1 L.Ed.2d 1428, discussed infra. See United Electrical, Radio and Machine Workers v. Miller Metal Products, Inc., 4 Cir., 215 F.2d 221; International Union United Furniture Workers v. Colonial Hardwood Flooring Co., 4 Cir., 168 F.2d 33.

strike clause. That clause did not have the significant exception contained in Drake's to the effect that a strike was permissible only if the other party had failed to abide by the decision of the Arbitrator after receipt of such decision. Moreover there, unlike the case at bar, the parties had already agreed to end the strike and to arbitrate the dispute which was the cause of the strike before the plaintiff brought suit. While Signal-Stat has frequently been cited and followed for other rules there enunciated,[5] our research reveals only two District Court cases in which it was relied upon to hold that an alleged breach of a no-strike clause is an arbitrable issue,[6] and only one other in which that part of the Signal-Stat opinion was cited with approval,[7] although several courts, in post Signal-Stat cases, have followed Markel.[8]

For the foregoing reasons we think it was error to stay the action. The order is reversed.

---

5. E. g., Judge Learned Hand's opinion in Council of Western Electric Technical Employees—National v. Western Electric Co., 2 Cir., 238 F.2d 892, 895.

6. Tenney Engineering, Inc. v. United Electrical, Radio and Machine Workers of America, Local 437, D.C.D.N.J., 174 F. Supp. 878; Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, United Rubber Cork, Linoleum and Plastic Workers, D.C.D.Conn., 167 F.Supp. 817.

7. Butte Miners' Union No. 1 of International Union of Mine, Mill and Smelter Workers v. Anaconda Co., D.C.D.Mont., 159 F.Supp. 431.

8. Lodge No. 12, Dist. No. 37, I. A. M. v. Cameron Iron Works, Inc., 5 Cir., supra note 4; International Union, United Auto Aircraft v. Benton Harbor Malleable Industries, 6 Cir., supra note 4; Gay's Express, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local No. 404, D.C.D.Mass., 169 F. Supp. 834; Structural Steel & Ornamental Iron Ass'n v. Shopmens' Local Union No. 545, D.C.D.N.J., 172 F. Supp. 354. The conflict between Structural Steel, supra, and Tenney Enginneering, supra note 6, has not yet been resolved by the Third Circuit.

Appendix C

DRAKE BAKERIES INCORPORATED, Plaintiff-Appellant,

v.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendant-Appellee.

No. 99, Docket 26343.

United States Court of Appeals
Second Circuit.

Submitted April 25, 1961.

Decided Sept. 12, 1961.

Weil, Gotshal & Manges, New York City (Robert Abelow, Milton Haselkorn and Marshall C. Berger, New York City, on the brief), for plaintiff-appellant.

O'Dwyer & Bernstein, New York City (Howard N. Meyer, New York City, on the brief), for defendant-appellee.

Rubenstein & Rubenstein, New York City (Jerome S. Rubenstein, New York City, on the brief), for International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO, amicus curiae.

Edward Maguire and Herman A. Grady, New York City, for New York State AFL-CIO, amicus curiae.

Before LUMBARD, Chief Judge, and CLARK, WATERMAN, MOORE, FRIENDLY and SMITH, Circuit Judges.

PER CURIAM.

This case was submitted to and considered by the active judges of this court after a majority of them had voted to grant the appellee's motion for rehearing en banc. Judges Clark, Waterman and Smith vote to affirm the

order of the District Court for the Southern District of New York, reported at 196 F.Supp. 148. They point to the three recent decisions of the Supreme Court in United Steelworkers of America v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; United Steelworkers of America v. American Mfg. Co., 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; and United Steelworkers of America v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424. Judges Lumbard, Moore and Friendly, not considering these decisions to be controlling, agree with the views of a panel of this court as expressed in an opinion written by Judge Swan and reported at 2 Cir., 1961, 287 F.2d 155 which reversed the order of the District Court.

Four judges are of the view that under such circumstances the order of the District Court is affirmed. Judges Lumbard and Friendly dissent and are of the opinion that under such circumstances the opinion of a panel of this court, reported at 287 F.2d 155, remains in effect and should not be withdrawn.

Accordingly the opinion reported at 287 F.2d 155 is withdrawn and the order of the District Court is affirmed.

Supreme Court of the United States

October Term, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL O'DWYER,
HOWARD N. MEYER,
50 Broad Street,
New York 4, N. Y.,
Attorneys for Respondent.

INDEX

Cases Cited

Supreme Court of the United States

October Term, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent raises no question concerning the formal matters set forth at pages 1 and 2 of the petition.

Statement of Matters Involved

Petitioner's quotations from the collective bargaining agreement involved, on pages 3-5 of the petition, are accurate as far as they go. Omitted, however, from Article VII at the top of page 5 of the petition is sub-section "(b)" which is set forth at the footnote at page 8a of Appendix B to the petition, as a note in Judge Swan's opinion, namely,

> "It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work stoppage, *subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike* or work stoppage." (emph. supp.)

There are errors in the statement of facts (pp. 5-6), which it is necessary to rectify.

We strongly object to the petitioner stating, as if it were a fact, although without reference to the record, that "the Union chose to cause its members to engage in a one-day strike on January 2, 1960" (Pet. p. 5). The Union categorically denied, under oath, that there was a strike (App. 3b-4b).* Moreover it proved, without any contradiction, that it was actively seeking to use the grievance machinery to resolve the dispute.

The difference between the parties that led to this lawsuit arose in December of 1959, when the employer proposed, and then threatened to impose unilaterally, amendment of the past practice and understanding between the parties concerning holiday weekends. There was an exchange of telegrams, in one of which the Union declared: "If you do not retract position, we shall demand arbitration". The opinion (later withdrawn), of the Court of Appeals by retired Judge Swan unfairly states: "The Union • • • did not request the designation of an arbitrator" (Pet. 9a). The fact is, and the record shows, that the Union could not, under the contract, request the designation of an arbitrator until its primary grievance steps had been exhausted and the record shows that these preliminaries were being actively pressed when this action was begun (App. 15b).

One of these steps, for example, was the submission "in writing, and as a prelude to arbitration [of], its grievance as to the proper rate of pay for the employees who reported December 26th", on which date the Union contended those members did not have an obligation to work (App. 4b).

A significant omission from petitioner's "Statement" relates to an incident of August, 1959, unconnected with the

---

* References "App." are to the Union's Appendix below.

disagreements out of which this action arose. It was shown, and it was undisputed, that six months before the action was begun, and during the life of this very collective bargaining agreement, the company claimed that the Union had called an "over-time strike" (App. 6b).

The company, petitioner here, in connection with *that* incident construed the contract to require it to go to arbitration over its grievance and it applied to the New York State Mediation Board for the designation of an arbitrator. It was undisputed that that Board, as a matter of long-established administrative practice and routine "handles arbitrations arising from claims of violations of various 'no strike' clauses" (App. 7b). This practical construction of the contract by the petitioner resulted in an assumption of jurisdiction by the Board, the designation of an arbitrator, and, ultimately, the settlement of the dispute (App. 14b).

All this was before Judge Ryan, when he granted the original motion to stay the action pending arbitration.

REASONS FOR DENYING THE WRIT

A. First Question Presented:

Even if it were not for this Court's granting of certiorari in *Atkinson* v. *Sinclair Refining Company No. 430*, October Term, 1961, and even if it were not for the internal division in the Second Circuit disclosed by its final *per curiam* decision of September 12, 1961, candor would compel us to say that the varying decisions in the various Circuits makes the First Question presented seemingly proper for review by this Court. To this statement, however, we make two qualifications.

In the first place, the difference among the Circuits, if analyzed out by careful scrutiny of the various contract

provisions and fact situations involved, might prove to be more apparent than real. The difference, if any, is not one in the interpretation of contract language. It is a difference in philosophical approach and on contract language many of the cases can be reconciled; others can be distinguished on the basis of an admission, not here present, that a strike had occurred, etc.

In the second place, the *per curiam* decision below is clearly correct on the record here presented. This Court denied certiorari (354 U. S. 911) in *Signal-Stat Corporation* v. *Local 475*, 235 F. 2d 298, and the contract language involved in that case is less favorable to the Union's position than the contract language in the present case.

With all due deference to retired Judge Swan and Judges Lumbard and Moore, there is literally ***nothing*** in the Drake-Local 50 contract which evinces an intention to exclude alleged violations of the no-strike clause from the ambit of the grievance-arbitration machinery. The last sentence of Article VII, quoted above (p. 1) evinces a contrary intention. There was no concession here, as there may have been in some of the midwest cases, that there had, in fact, been a strike. The employer, petitioner here, has itself construed the agreement as including an alleged "over-time strike" as a grievance. The withdrawn opinion of the Court of Appeals is seemingly based on an unstated hostility to arbitration, *per se*, rather than on contract language.

We do appreciate that the correctness of a decision is no more a reason for refusing the writ than the fact that a decision is wrong is necessarily a reason for granting the writ.

B. The Second Question Presented:

As a result of recent legislation, there are now nine active judges in the Second Circuit and it is not likely that an even division will recur on the extremely rare occasions

when it grants an *en banc* hearing. The question presented is a freak; it is one of rare curiosity rather than of general interest. In any event, it is a question which need not be settled by this Court: there is no reason why each Circuit should not be free to develop and apply its own rule with respect to such a rare and unusual division.

CONCLUSION

For the foregoing reasons, this petition should be denied. If, however, the Court should determine to grant review, the case should be set down for argument with No. 430.

Respectfully submitted,

PAUL O'DWYER,
HOWARD N. MEYER,
50 Broad Street,
New York 4, N. Y.,
Attorneys for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABELOW,
Attorney for Petitioner,
60 East 42nd Street,
New York 17, New York.

Of Counsel:
MILTON HASKELKORN,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES.

INDEX

INDEX OF AUTHORITIES

Cases:

Secondary Sources:

Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 196 F. Supp. 148 (R 20-22). The original opinion of the United States Court of Appeals for the Second Circuit is reported in 287 F. 2d 155 (R 38-45). The opinion of the United States Court of Appeals for the Second Circuit *en banc* is reported in 294 F. 2d 399 (R 59-60).

Jurisdiction

The judgment of the Court of Appeals was entered on September 12, 1961 (R 61).

A petition for a writ of certiorari was filed on December 11, 1961 and granted on January 22, 1962 (R 62). The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

Statute Involved

Section 301, Labor Management Relations Act of 1947; 29 USC §185, 61 Stat. 156:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
>
> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are en-

gaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Questions Presented

1. Were respondents entitled to have petitioner's action, brought under Section 301 (a) of the Labor Management Relations Act of 1947 for violation of a no-strike clause contained in the collective bargaining agreement between the parties, stayed pending arbitration?

2. Did the even division of the active Judges in the Second Circuit upon reargument *en banc* affirm the original decision of the Court of Appeals for the Second Circuit or the decision of the District Court for the Southern District of New York?[1]

---

1. Although this question is theoretically presented by this case and was one of the questions presented for review in the petition for a writ of certiorari herein, its practical significance for this case has been eliminated by this Court's granting a writ of certiorari in *Sinclair Refining Co.* v. *Atkinson*, *No. 434*. (This case has been set down for argument immediately following the *Sinclair* case.) The *Sinclair* case presents the same first question without presenting the second question. Thus, this Court in determining the *Sinclair* case must of necessity resolve the substantive issue in this case. After such a determination, the second question becomes moot. Whatever the effect of the Second Circuit's split, that effect will be clearly superseded by the determination of this Court. Accordingly, this question will not be argued.

Statement

Respondent Local 50, American Bakery & Confectionery Workers International AFL-CIO (hereinafter referred to as the "Union") is the collective bargaining representative for certain employees of Petitioner Drake Bakeries Incorporated (hereinafter referred to as "Drake"). (R 10)

Drake and the Union are parties to a collective bargaining agreement regulating their respective rights and obligations. (R 10) This collective bargaining agreement includes the following pertinent provisions setting forth the grievance and arbitration machinery:

> "ARTICLE V—GRIEVANCE PROCEDURE
>
> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.
>
> In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.
>
> (b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven

(7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided. (R 6-7)

"ARTICLE VI—ARBITRATION

(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

(c) The decision of the Arbitrator shall be binding upon both parties for the duration of this contract.

(d) Should any party fail, upon written notice, to appear before the Arbitrator, in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

(e) The arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties." (R 7)

A specific no-strike clause was also contained in the collective bargaining agreement:

"ARTICLE VII—NO STRIKES

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lockout

> for any reason during the terms of this contract, except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision. • • •" (R 8)

On December 16, 1959 Drake announced to the Union Committee and to its employees that in order to meet competition it was scheduling production for the Saturday after Christmas, December 26, 1959, and the Saturday after New Year's Day, January 2, 1960. (R 11-12, 15-16) Despite the fact that the company clearly had the right to reschedule production, both as an inherent management prerogative and specifically under the collective bargaining agreement, the Union objected to the rescheduling. (R 12-15) Instead of utilizing the grievance machinery available to it under the collective bargaining agreement, the Union chose to cause its members to engage in a one-day strike on January 2, 1960 in violation of both the no-strike clause of the contract and the grievance and arbitration machinery provided for in the contract. (R 16-18). The Complaint herein alleges that the Union "authorized, instigated and encouraged" its members to engage in this one-day strike (Par. Eighth, R 4).

For the purposes of this appeal, we need not consider the merits, if any, of the Union's contention that management had no power to schedule work, since the Union had available to it under the contract appropriate grievance machinery. Instead of utilizing the contractual mechanism for presenting and resolving its grievance, however, the Union chose to cause its members to engage in a one-day strike on January 2, 1960 in flagrant violation of both the contract's no-strike clause and its grievance and arbitration machinery. The breach is particularly inexcusable since the Union had ample time from December 16, 1959 until January 2, 1960 to institute appropriate grievance

proceedings. Instead, it chose to interrupt production by relying on its economic strength to afford it illegal self help.

Drake promptly instituted this action under Section 301 in the United States District Court for the Southern District of New York seeking damages for that breach of the no-strike clause. (Complaint R 2-4) The Union made a motion to stay the proceedings herein pending arbitration. (R 5) This motion was granted by Chief Judge Sylvester Ryan. (R 20-22) Drake thereupon appealed to the United States Court of Appeals for the Second Circuit. A panel consisting of Judges Swan, Lumbard and Moore unanimously decided that the breach of the no-strike clause was not covered by the arbitration clause of the contract and, hence, the Union's motion for a stay was improperly granted. (R 38-45)

The Court of Appeals for the Second Circuit granted the Union's motion for reargument *en banc*. (R 57) Upon such reargument, the six active judges of the Second Circuit were evenly divided, Judges Lumbard, Moore and Friendly voting to sustain the original determination of the Court of Appeals and Judges Clark, Waterman and Smith voting to reverse that determination and restore the District Court decision. The entire Court, by a 4 to 2 vote, then determined that the effect of this evenly divided Court was to affirm the District Court decision rather than the original Court of Appeals decision. (R 59-60)

Summary of Argument

1. As recognized by the drafters of Section 301 and this Court, the no-strike clause of a collective bargaining agreement has unique importance as the employer's only benefit from that agreement. Accordingly a breach of a no-strike clause deprives an employer of the only consideration he received from the agreement. Further, since

the grievance and arbitration machinery is provided by a collective bargaining agreement in order to prevent the settling of grievances through industrial warfare, such a strike violates the grievance and arbitration clauses as well.

It was the intent of the framers of Section 301 to provide judicial redress for such violations as manifested by the legislative history of that section. Since these framers must have been aware of the near universality of arbitration clauses, they could not have intended that such an arbitration clause could defeat judicial relief. An arbitrator, by virtue of his status, is not the proper person to enforce a no-strike clause. Further, Congress, by providing certain agency rules applicable to Section 301 actions generally but which are pertinent usually only in actions involving breaches of a no-strike clause, indicated it did not intend to require that actions for a breach of a no-strike clause must be arbitrated. These considerations have resulted in a near unanimity of opinion among the courts which have considered this question.

2. A union's breach of a no-strike clause is so fundamental a breach of the grievance and arbitration clauses that it should not be allowed to invoke these clauses to protect it from judicial sanctions against the very same violation. This is analogous to waiver of the right to arbitrate by other less basic violations of the arbitration clause. This has been recognized by several courts and is not inconsistent with other court decisions based upon the scope of the arbitration clause. This argument is based upon the unique importance of a no-strike clause and does not apply to any other clause of the collective bargaining agreement.

3. The arbitration mechanism of the contract is not suited for enforcing no-strike clauses. Hence the courts

have almost invariably held that a breach of a no-strike clause is not within the scope of an arbitration clause. This was in no way affected by this Court's decisions in the *Steelworkers* cases. Indeed those cases demonstrate the need for the courts' enforcing the employer's side of the collective bargaining agreement as they enforced the union's side in the *Steelworkers* cases. Furthermore the scope of the arbitration clause should be interpreted so as to best promote industrial peace and hence to allow judicial redress for breaches of no-strike clauses.

ARGUMENT

I

Basic Considerations.

The issue presented by this case is one of fundamental importance in labor law. It concerns the breach of a no-strike clause and the flouting of the grievance and arbitration machinery provided for by the contract. This is not only one of the most serious situations in labor-management relations, but also, as we will demonstrate below, a problem basic to the drafters of Section 301. Accordingly before discussing the various legal rationales which support petitioner's position herein, we will first discuss why a decision in favor of the petitioner will strengthen industrial peace—the Congressional purpose for Section 301.

The basic analysis of Section 301 is, of course, this Court's opinion in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957). In that case this Court, at page 454, quoted the language of Senate Report No. 105, 80th Congress, 1st Session, p. 16, in order to reveal the Congressional intent in passing Section 301:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is a little reason why an employer would desire to sign such a contract.
>
> Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. * * *"

It would appear that Senators who drafted the clause which ultimately became Section 301, regarded a no-strike clause as the core of any collective bargaining agreement. In order to provide for the judicial enforcement of such clause, it set up the Federal forum provided in Section 301.

This Congressional view of the basic importance of the no-strike clause to orderly collective bargaining was shared by this Court. Thus, it stated on p. 455 of the *Lincoln Mills* case, *supra:*

> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

This Court predicated its more recent decisions on this subject largely on this relationship. Thus, in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) this Court made clear in a case involving both a grievance procedure culminating in arbitration and a no-strike provision (as in the instant case):

> "The present federal policy is to promote indusrial stabilization through the collective bargaining agreement. Id., 353 at 453, 454 (referring to *Lincoln Mills, supra.*) A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[4]

"4. Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the 'quid pro quo' for the agreement not to strike. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912" (p. 578).

This Court thus again stated that the arbitration and grievance provision of a contract gain their crucial importance because they are a necessary corollary to a union's relinquishing its right to strike during the term of the collective bargaining agreement.

Indeed, in the same case at p. 583, this Court held:

> "A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement * * *"

Thus, it is precisely on this assumption of the equally crucial importance to the employer of "an absolute no-

strike clause", that the epochal decision in *Lincoln Mills* made federal law applicable to Section 301 cases, and on behalf of the union specifically permitted enforcement of arbitration clauses contained in collective bargaining agreements. On the same assumption, the *Warrior & Gulf* opinion stated "everything that management does is subject" to the arbitration clause.

It follows inevitably that if the union's side of the "quid pro quo" requires judicial redress under Section 301, then the employer's side of the "quid pro quo"—the no-strike clause, certainly does.

In the light of the Congressional intent and this Court's prior decisions, what are the consequences of a strike in violation of a no-strike clause?

First and foremost, it deprives the employer of virtually the only benefit which he obtains from a collective bargaining agreement, namely, a certain period of labor peace free from strikes and other work interruptions. Such a strike, therefore, does nothing less than deprive the employer of the only fruits he gains from a collective bargaining agreement. This would be patently so even it were not so vigorously expressed by both Congress and this Court as Federal policy. Clearly, the collective bargaining agreement was so intended in this case.

The no-strike clause aside, this Court in the recent *Warrior & Gulf* case, *supra,* again and again emphasized that the grievance and arbitration machinery is created to prevent the self-help of economic power for the duration of the agreement. (The remedy for the breach of such machinery is supplied by 301.)

Thus:

> "Here arbitration is the substitute for industrial strife." (p. 578)

and again

> "For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement * * *." (p. 582)

Actually, then, a strike not only violates the no-strike clause of a collective bargaining agreement, but the grievance and arbitration procedure as well. This is so because the grievance procedure implies a method of resolving grievances which is not only inconsistent with the use of economic power but indeed created expressly to prevent such use.

The Federal courts have recognized this when they have held that where a collective bargaining agreement contains appropriate grievance procedure, a strike is illegal even in the absence of a specific no-strike clause. In *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, 230 F. 2d 576 (1st Cir. 1956), the Court of Appeals for the First Circuit at 538-584 held:

> "As stated by Chief Judge Parker in *United Construction Workers* v. *Haislip Baking Co.*, 4 Cir., 1955, 223 F. 2d 872, 876-877, certiorari denied, 1955, 350 U. S. 847, 76 S. Ct. 87:
>
> > 'It is argued that a strike could not constitute a breach of a contract which did not contain a no-strike clause; but we think it clear that the purpose of the contract was to require the settlement of disputes and grievances by a procedure which would not cause a disruption of business that would necessarily result from a strike and that a strike without following such procedure was necessarily a breach.'
>
> "We think such was in effect the decision in *N.L.R.B.* v. *Sands Mfg. Co.*, 1939, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, where a strike was

deemed to be a breach of a collective bargaining agreement which did not contain an express no-strike clause, and thus was not a protected collective activity, with the consequence that action by the employer in discharging such strikers was held not to be an unfair labor practice under §8 (3) of the National Labor Relations Act. To the same effect see *N. L. R. B.* v. *Dorsey Trailers, Inc.*, 5 Cir., 1950, 179 F. 2d 589.

"There is strong support among secondary authorities for the view that arbitration provisions in a collective bargaining agreement, of the sort here involved, should be read as implying a covenant on behalf of the union not to call a strike in derogation of the arbitration procedures. See Cox, 'Some Aspects of the Labor Management Relations Act, 1947', 61 Har. L. Rev. 274, 308-09 (1948); Daykin, 'The No-Strike Clause', 11 U. Pitt. L. Rev. 13, 34 (1949); Wolk and Nix, 'Work Stoppage Provisions in Union Agreements', 74 Mo. Labor Rev. 272 (1952); BNA, Coll. Barg. Negot. Serv. 15:325 (1954)."

This reasoning was also adopted in *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346 (6th Cir., 1958), *aff'd*, 361 U. S. 459 (1960), and *Gay's Express, Inc.* v. *International Brotherhood of Teamsters*, 169 F. Supp. 834 (D. Mass. 1959). Moreover in the very agreement here involved, the parties have expressly provided in the grievance machinery provision "that in the handling of grievances there shall be no interference with the conduct of the business." (R 7)

In addition to the Federal cases cited above and the authorities cited therein, this Court has already indicated in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U. S. 30 (1957) that where Congress had provided a method for settling grievances, it would sustain the enjoining by a Federal court of direct strike action. As stated by a serious student of the law of labor

relations, Charles O. Gregory, in **The Law of the Collective Agreement,** in referring to the *Chicago River* case, at p. 645:

> "I think a contract provision for arbitration whether or not there is a no-strike clause, might be held as analogous to the Congressional provision for handling grievances in that situation."

This result is a necessary corollary of *Lincoln Mills* and *Warrior & Gulf*. Needless to say, where, as here, there is a specific no-strike clause, as well as contractually provided grievance and arbitration machinery, then the illegality of a strike during the term of the collective bargaining agreement is even more beyond dispute.

We reiterate that grievance and arbitration procedure exists in a collective bargaining agreement to prevent industrial warfare and the resolution of the issues that arise in the day-to-day operations of an industrial plant by naked economic strength; it does not exist to afford a remedy for the very institution of the warfare it is designed to prevent.[2] That remedy, we submit, was supplied by Congress when it passed Section 301.

It will be recalled that the United States Senate, in its report on what eventually became Section 301, stated the following:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective

2. In this respect it differs fundamentally from the arbitration machinery provided for in a commercial contract.

> method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts."
>
> Quoted as authority, *Lincoln Mills*, *supra*, at p. 454.

Clearly, the drafters regarded a no-strike clause as the focal point of a collective bargaining agreement. In order to provide for the judicial redress for the violation of such clause, it passed Section 301.

We submit that any argument to the contrary would rest upon the unrealistic assumption that the drafters of Section 301, one of the most important sections of the Taft-Hartley Act, after laboring in committee for many hundreds of hours and after becoming totally immersed in the realities of labor relations, were ignorant of the patently obvious fact that collective bargaining agreements almost invariably contain grievance and arbitration procedure.[3] For if respondent is correct and a Section 301 action for a breach of a no-strike clause may be stayed pending arbitration, then Section 301 is absolutely meaningless to effect its primary purpose—the deterrence of industrial strife by providing a Federal judicial remedy for breach of the two unique and crucial provisions of any collective bargaining agreement, namely, the promise of

3. 99 per cent of the contracts studied by the Bureau of National Affairs contain some grievance procedure. Indeed, 100 per cent of the contracts in manufacturing establishments contain grievance procedures. Further, 94 per cent of all contracts provide for arbitration. 2 Collective Bargaining Negotiations and Contracts. pp. 51:1, 51:7 (Bureau of National Affairs).

the union not to strike and the promise of the employer to arbitrate grievances.

It might perhaps be contended that an employer's remedy under 301 is limited only to that similarly afforded to a union, namely, specifically to enforce the agreement to arbitrate as was done in *Lincoln Mills*. Obviously such a contention completely ignores both the realities of the situation, as well as the law itself.

In terms of practical labor relations, it cannot be contended that the right of redress before an arbitrator against a union for violation of a no-strike provision, provides any effective deterrent against such action. The plain fact is that the nature of the continuing collective bargaining relationship under a contract and the role of the arbitrator to peacefully keep that relationship intact, is such that an arbitrator cannot effectively impose a severe sanction on either the employer or the union. He is not a judge but a peacemaker. As the late Dean Shulman, a distinguished labor arbitrator, stated:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not." Shulman, "Reason, Contract, and Law in Labor Relations", 68 Harv. L. Rev. 999, 1016 (1955).

Quoted in part as authority, *United Steelworkers* v. *Warrior & Gulf, supra,* at page 581.

Similarly, another student of labor law also realized the realities of a labor arbitrator's position preclude him from meting out justice when a union has breached the no-strike clause.

> "Normally, the only contract term the employer wishes to enforce by outside sanction is the no-strike clause. Assuming the union's good faith, both parties desire this clause enforced without delay—the union has a special interest in its enforcement if there is liability in damages for its breach. An arbitrator cannot enforce a no-strike clause and probably is not the proper person to assess damages for its breach. Enforcement of a no-strike clause is best left to the courts and assessment of damages to the jury." Francis W. Lowden, Jr., "Labor Arbitration Clauses: Draftmanship Avoids Litigation," 43 Va. L. Rev. 197, 202-203 (1957).

We respectively submit that these realities make clear that the only effective deterrent again the flouting of the machinery provided in a collective bargaining agreement to prevent industrial strife, is for a Federal District Court, which is in the words of Dean Shulman "a public tribunal imposed upon the parties by superior authority which the parties are obligated to accept", to enforce the no-strike provision.

Moreover, the language of the statute certainly makes clear that it was not intended that 301 be legislation restricted solely to enforce arbitration clauses and arbitration awards. For example, Section 301 not only sets up a Federal judicial forum for "suits for violation of contracts between an employer and a labor organization • • •", but also sets forth several rules of law which are applicable to such suits. Sections 301(b) and 301(e) set forth rules of law governing when a party is to be bound by the acts of its agents. Obviously, these agency

rules contained in 301(b) and (e) primarily are applicable in no-strike clause cases. They thus envisage law suits for violation of a no-strike clause under the Act, rather than for their arbitration, since no rule of law can ever bind an arbitrator. This clearly indicates that Congress, which not only must have known of the almost universal use of grievance and arbitration clauses in collective bargaining agreements but also specifically encouraged their use in this very same act, (§203(d); 29 U.S.C. §173(d), 61 Stat. 153) intended the Federal courts, rather than an arbitrator, to be the forum to enforce the no-strike clause and set up certain rules of law binding upon these courts. Indeed, the Federal courts have again and again granted damages to an employer for breach of the critical provisions of the no-strike clause and arbitration procedures.

That judicial action instituted by a union against breach of the grievance and arbitration procedure is proper under Section 301, was made clear in *Lincoln Mills, supra*, when an employer violated the procedure. That it should be equally available to the employer when the union violates the "quid pro quo" it promised, i. e. the no-strike provision, is but a matter of elemental fairness and sound labor relations and moreover, supported by a wealth of judicial authority.

As will be discussed in detail below, every Court of Appeals which has considered this problem (except for the Second Circuit, from which this appeal is taken) has held that a breach of a no-strike clause is actionable under Section 301 whether or not there is an applicable arbitration clause. Some courts have relied upon the fundamental inconsistency in allowing a union to shield itself behind the grievance and arbitration provision which it has flagrantly violated. Others have emphasized the scope of the arbitration clause. Still other courts have reached

the same conclusion without formally adopting either of the two rationales. But in any event the result is the same. We submit the reason for this practical unanimity is the basic considerations of industrial peace we have set forth above.

This is perhaps best illustrated by the original opinion of the Second Circuit herein. There, the Court presented a discussion of the crucial importance of the no-strike clause before rendering its decision based upon the scope of the arbitration clause in question (R 43-44). It therefore recognized that the fundamental question in any 301 suit is what alternative will best suit industrial peace. We submit that the only possible answer is the providing of a Federal judicial forum to punish the person who breaches the industrial peace.

II

A strike is so fundamentally inconsistent with the grievance and arbitration machinery that a union should not be permitted to invoke the very machinery it has violated in order to thwart Congressionally afforded judicial redress for such violation.

When the Union herein decided to ignore the grievance and arbitration machinery in resolving its dispute about scheduling with Drake and instead decided to use the self help of an illegal strike, we submit that it "waived" its rights to protect such illegal action by the very clause it had just violated. It is impossible to conceive of a more emphatic rejection of an arbitration clause than the resort to an illegal strike in order to settle a grievance that would normally be arbitrated under the contract. Whether the legal rationale is denominated waiver, default, estoppel or some other characterization, a strike is so fundamentally inconsistent with the griev-

ance and arbitration machinery that the Union should not be allowed to invoke the very machinery it has violated in order to thwart the Congressionally afforded judicial redress for that very violation. The Union cannot first unilaterally substitute a strike for the grievance and arbitration procedure and then, when it suits its convenience, utilize such procedure as a shield against judicial redress for that very same misconduct.

This has been recognized by certain Federal courts who have clearly held that a union by striking, in breach of the arbitration clause, forfeits the power to compel arbitration of that strike. While these cases have been based on a rationale implying estoppel, forfeiture or waiver of rights, the courts have stressed basic policy considerations rather than any one rationale.

These cases are, in a sense, analogous to other cases where a union or an employer has been held to waive its rights to arbitration by a failure to comply with some procedural requirement of the particular arbitration clause involved. Thus, in *Brass & Copper Workers Union* v. *American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), a union was held to have waived its rights to demand arbitration when it submitted its grievance to arbitration 13 days after the company's final answer, instead of during the 10-day period provided for in the contract. See also *Boston Mutual Life Insurance Co.* v. *Insurance Agents' Int. Union*, 258 F. 2d 516 (1st Cir. 1958) and *Council of Western Electric Technical Employees* v. *Western Electric Co.*, 238 F. 2d 892 (2nd Cir. 1956). If a union could lose the right to arbitrate by such a trivial violation as a 3-day delay in submitting a grievance to arbitration, it should certainly lose its right when it goes on strike, rather than submit a grievance to arbitration. A more flagrant disregard of the arbitration clause would be impossible to conceive.

Accordingly, the courts have found a union not entitled to utilize an arbitration clause after a strike — the most fundamental violation possible of such an arbitration clause.

In *Cuneo Press* v. *Kokomo Paper Handlers' Union*, 235 F. 2d 108 (7th Cir.), *cert. denied*, 352 U. S. 912 (1956), the Seventh Circuit denied a motion similar to the one at bar. In that case the defendant union, like the Union in the instant case, "at no time made any attempt to submit any agreement or complaint to arbitration, but on the contrary proceeded to call [a] strike without warning or notice to plaintiff" (at p. 111). The Seventh Circuit stated:

> "If the unions had grievances, it is apparent that they ignored the grievance procedure, as well as the provision for arbitration. Instead they instituted a sit-down strike which was disruptive of plaintiff's business and the work of its employees. That action was in direct conflict with the arbitration procedure called for by the contract. Indeed, the unions in their brief herein quote the following language from Lewittes & Sons v. United Furniture Workers, D. C. 95 F. Supp. 851, at p. 856:
>
> > "'Where the parties manifest a purpose to dispose of their disputes by arbitration rather than resort to the use of economic force or pressures, their agreements should be liberally construed with a view towards the encouragement of arbitration. • • • The Courts should be reluctant "to strike down a clause which appears to promote peaceful labor relations rather than otherwise.'"
>
> "The unions chose to act suddenly and without warning in using the economic force or pressure of a sit-down strike. Obviously, a chief purpose of the arbitration agreement was to avoid a strike.

> When the unions embarked upon the strike they voluntarily by-passed arbitration. When they struck the wrong was done and the damage to plaintiff began. Then it was that plaintiff's right of action for damages and injunctive relief to prevent further damage accrued.
>
> "Faced with plaintiff's suit for injunction and damages, the unions sought a stay order pursuant to Section 3 of the Arbitration Act. However, their position at that time was untenable • • • Even if the unions originally had an issue referable to arbitration, they chose instead to resolve that issue in their favor by use of their economic strength. Having thus violated their contract to plaintiff's damage it was too late for them to demand arbitration on that issue." (At pp. 111-112)

The reasoning of the Seventh Circuit is equally applicable here.

The First Circuit has also held that a strike in violation of the grievance and arbitration provision, even in the absence of a no-strike clause, deprives a union of any power to compel arbitration of that strike. In *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, 126 F. Supp. 466 (D. Mass., 1954); 129 F. Supp. 313 (D. Mass., 1955), *aff'd*, 230 F. 2d 576 (1st Cir., 1956), the District Court, finding that a strike was tantamount to a refusal to arbitrate, concluded (129 F. Supp. 313, at 315):

> "I do not find that, as now contended by the defendant, the plaintiff had a duty to arbitrate the strike. The defendant having broken its contract and gone on strike because it refused to arbitrate an individual dispute, is not in a position to contend that the plaintiff should then have insisted on arbitrating the strike as well."

Clearly, an important and relevant consideration to the Court of Appeals in affirming, was the policy of promoting

industrial stability. The Court was influenced by the fundamental labor policy first enunciated in *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939) which held that strikes in violation of specific contractual provisions were "unprotected" by the National Labor Relations Act. In examining the unfair labor charges emanating out of the *Mead* dispute, the NLRB stated in language quoted with approval by the First Circuit therein at p. 584:

> "Every encouragement should be given to the making and enforcement of such (arbitration) clauses. But, if the employees may effectively call upon the Board to protect them when they arbitrarily breach clear and binding arbitration clauses of this kind, and turn to the use of economic force over the settlement of grievances rather than to the contractual, quasi judicial procedure, the effect will be to discourage the making of, and the adherence to, contractual arbitration procedures. To hold that a strike in furtherance of such a material breach of a complete and binding contractual arbitration clause is to be protected by this Board would be contrary to the labor policy embodied in the National Labor Relations Act as interpreted by the Courts of Appeals and the Supreme Court."

The *Mead* decision was also followed in *Gay's Express, Inc.* v. *International Brotherhood of Teamsters*, 169 F. Supp. 834 (D. Mass. 1959) in which the Court stated at p. 836:

> "Defendant having violated its contract by going to strike and refusing to follow the grievance procedure cannot now contend that plaintiff is barred from asserting its right to recover damages by an action in this court and must refer the question of the strike itself to the grievance procedure."

These cases thus make it abundantly clear that irrespective of the scope of the arbitration clause, the resort to economic pressure rather than the utilization of contractual grievance and arbitration procedure, by its very nature bars the Union from compelling arbitration of its own illegal strike action.

What is urged here is that a no-strike clause is the very heart of a collective bargaining agreement, and irrespective of the rationale, violation of such clause is not arbitrable.

Thus, in *Lodge No. 12* v. *Cameron Iron Works*, 257 F. 2d 467 (5th Cir.), *cert. denied*, 358 U. S. 880 (1958), the Fifth Circuit stated the rule that controversies are not arbitrable when such controversies fall in any one of three categories. That is (at p. 471):

> "* * * where the controversy in question is specifically excluded, where because of a listing of many arbitrable incidences, the instant controversy is impliedly excluded, and where the controversy or grievance concerns violation of a 'no-strike clause'."

See also *Refinery Employees Union* v. *Continental Oil Co.*, 268 F. 2d 447 (5th Cir.), *cert. denied*, 361 U. S. 896 (1959).

Here again it is made clear that breach of the no-strike clause is not subject to arbitration irrespective of the broadness of the grievance and arbitration provision.

The *Cameron* rule has been specifically followed as recently as September 1959 in *Cuneo Eastern Press, Inc.* v. *Bookbinders Union*, 176 F. Supp. 956 (E. D. Pa. 1959) where the Court quoted the rule with approval.

In *Structural Steel & Ornamental Iron Association* v. *Shopmens Local Union*, 172 F. Supp. 354 (D. N. J. 1959) the Court also quoted with approval the *Cameron* rule

that breaches of no-strike provision are by their very nature not arbitrable. The Court stated (p. 360):

> "I find that the contract between the parties did not expressly contemplate that such issue of damages was a dispute or controversy to be settled by grievance and arbitration procedures. Further, since this issue concerns a violation of the no-strike clause it is not a grievance referable to arbitration."

It is significant to note that *Structural Steel* was cited approvingly by this Court in *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 567, n. 4 (1960).

Similarly Solicitor General Cox has recently stated in "Reflections upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1484 (1959):

> "The *Lincoln Mills* decision established three fundamental rules.
>
> (1) Section 301 requires the judiciary to develop a federal substantive law of collective-bargaining agreements derived from the provisions and policies of the NLRA, general legal principles and other appropriate sources.
>
> (2) One of the rules embodies in this federal law of collective-bargaining agreements is that an agreement to arbitrate disputes arising under the agreement is binding and enforceable by a decree for specific performance.
>
> (3) The Norris-LaGuardia Act, which restricts the power of the federal courts to issue injunctions in labor disputes, is not applicable to a union's suit for specific performance of an employer's promise to arbitrate.
>
> These rulings establish the machinery necessary for the effective judicial enforcement of agreements to arbitrate and arbitration awards *except when a union resorts to a strike upon an arbitrable grievance.*" (Emphasis supplied.)

It is readily apparent from the second rule set forth above that in so far as motions to compel arbitration are concerned, Solicitor General Cox understood *Lincoln Mills* to specifically sanction their availability. Consequently, when Solicitor General Cox excepts from the direct impact of these rules the situation of a union's strike in the face of an arbitrable grievance, it seems clear that he, too, recognizes that compelling arbitration is not the answer to such a strike. He clearly recognizes the fundamental inconsistency of arbitrating such a strike. This fundamental inconsistency makes it evident that an action under 301 for the breach of the no-strike provision is the answer.

The cases which deal with the problem of the arbitrability of the violation of a no-strike provision in the terms of the scope of the arbitration clause, do not disagree with the above rationale but merely reach the same result by a different route. For example, in *Markel Electric Products, Inc.* v. *United Electrical Workers*, 202 F. 2d 435, 437 (2nd Cir. 1953), the Court stated that as to the question of whether the strike relieved "the company of any duty it otherwise would have had under the contract to submit to arbitration (need not be decided) * * * since we do not think that the dispute here involved is within the scope of the arbitration clause".

Conversely, where a court relied on the "inherent inconsistency" rationale, it saw no need to discuss the "scope of the arbitration clause" rationale.

Thus, in *W. L. Mead* v. *International Brotherhood of Teamsters*, 129 F. Supp. 313, at 315, n. 3 (D. Mass. 1955), the Court stated:

> "It is not necessary to reach the question of whether a strike was arbitrable matter under the contract."

See also *Gay's Express, Inc.* v. *International Brotherhood of Teamsters, supra* (alternative holdings).

In this connection, Judge Ryan, in his decision herein, which was reinstated by the Court of Appeals for the Second Circuit *en banc,* stated that

> "Plaintiff next contends that, even if arbitration be mandatory by violating one clause of the agreement defendants waived their rights under another clause (arbitration). We can find no logical basis for this argument, since if this premise were sustained, every violation of a collective bargaining agreement would act as a waiver of the violating party's right to arbitration, and this would destroy all arbitration agreements which are looked upon with great favor." (R 21)

We respectfully submit that everything that we have said above, everything this Court has said in the *Lincoln Mills* and *Warrior & Gulf* cases, and everything stated by the framers of Section 301 in the legislative history, demonstrates that the grievance and arbitration machinery and the no-strike provision are not wholly independent clauses but bear an intrinsic, inevitable and inextricable relationship to each other. Indeed, many courts have held that the resort to self help, even in the absence of a specific no-strike clause, constitutes a violation of a grievance and arbitration provision.

There can be no question that the waiver or estoppel or inherent inconsistency here involved, does not permanently preclude arbitration or affect any other clause in that contract, but is restricted merely to the very violation of the arbitration procedure for which this 301 action is brought. We cannot over-emphasize that the basic considerations we have herein set forth apply only to the core no-strike and no-lockout provisions. To the extent that Judge Ryan implies otherwise, he has, it is respectfully submitted, totally misconstrued our argument.

III

The grievance and arbitration procedure here involved does not encompass the breach of the no-strike provision.

In general, when a grievance and arbitration provision is inserted into a collective bargaining contract, it is designed to resolve the myriad of day-to-day questions which arise in any industrial establishment—should Employee A be discharged, should Employee B receive holiday pay, at what rate of pay should Employee C be compensated, is Employee D entitled to a leave of absence, what are the shop rules that govern a new method of operation, and the like. The typical grievance and arbitration provision like the one in the contract here in issue provides first for a discussion of any grievance at the local shop level. Thereupon the question is sent to increasingly higher levels of authority for both the union and the employer. If agreement is not possible at the highest level, it is then submitted for arbitration.

Obviously, this mechanism would be completely unsuited for resolving such a fundamental question as the breach of a no-strike clause. Further as pointed out in Point I, an arbitrator is not likely to impose the necessary sanctions for a violation of the no-strike clause. Accordingly, the parties could not have intended that the grievance and arbitration provisions should apply where they are entirely unsuited—namely to breaches of the no-strike clause. As the Second Circuit stated in *Markel Electric Products, Inc.* v. *United Electrical Workers*, 202 F. 2d 435, 437 (2d Cir. 1953):

> "The whole tenor of the contract was to lay a groundwork of agreement as to wages, hours and

> conditions of employment and to provide a peaceful method for the settlement of grievances and disputes over the meaning and application of the agreement with respect to those matters. If efforts in accordance with the procedure of Article VIII proved to be ineffective, resort might be had to Article IX, which provided that an unsettled dispute or grievance was to be submitted to arbitration '* * * upon written notice of the party filing the grievance * * * to be served upon the other party within five (5) days after the meeting referred to in the third step of the grievance procedure outlined above.' The quoted language shows clearly that arbitration was to be but a fourth step in the grievance procedure, and as such the subject matter to which it is applicable is no broader than that to which the first three steps applied. The dispute as to whether the union was justified in calling the strike is one certainly not capable of resolution at a conference between an employee or a department steward, or both, and a department foreman; or between the chief steward and the general superintendent. It is, therefore, not the kind of dispute which was intended to be resolved by submission to arbitration".

Similar results have been reached in every other Circuit that has considered this matter. These cases were collated in the original decision of the Court of Appeals herein as follows:

> "Support for this conclusion is to be found in *Markel Electric Products, Inc.* v. *United Electrical, Radio & Machine Workers*, 2 Cir., 202 F. 2d 435, 437, which held that the alleged breach of the no-strike provision was not 'within the scope' of an arbitration clause which we read as at least as broad as the one before us. Our conclusion also

accords with decisions in a number of other circuits.

"5. *International Brotherhood of Teamsters, Local No. 25* v. *W. L. Mead, Inc.*, 1 Cir., 230 F. 2d 576; *Lodge No. 12, Dist. No. 37, I.A.M.* v. *Cameron Iron Works, Inc.* 5 Cir., 257 F. 2d 467, 471, *cert. denied*, 358 U. S. 880; *International Union, UAW* v. *Benton Harbor Malleable Industries*, 6 Cir., 242 F. 2d 536; *Hoover Motor Express Co.* v. *Teamsters Local No. 327*, 6 Cir., 217 F. 2d 49; *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union No. 34*, 7 Cir., 235 F. 2d 108. Also in accord are two decisions of the Fourth Circuit which were disapproved by this court in *Signal-Stat Corp.* v. *Local 475, United Elec. Workers*, 2 Cir., 235 F. 2d 298, *cert. denied*, 354 U. S. 911, discussed infra. See *United Elec. Workers* v. *Miller Metal Prods., Inc.*, 4 Cir., 215 F. 2d 221; *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co.*, 4 Cir., 168 F. 2d 33." (R 44).

The Court then went on to discuss an earlier case in the Second Circuit, *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 298 (2d Cir., 1956), *cert. denied*, 354 U. S. 911 (1957), in which a 301 action for breach of a no-strike clause was stayed pending arbitration. After distinguishing that case on its facts, the Court went on to consider the treatment of the *Signal-Stat case* in other Federal courts as contrasted with the treatment of *Markel Electric Products, Inc.* v. *United Electrical Workers, supra*, quoted above.

> "While *Signal-Stat* has frequently been cited and followed for other rules there enunciated,[6] our research reveals only two District Court cases in which it was relied upon to hold that an alleged breach of a no-strike clause is an arbitrable issue,[7] and only one other in which that part of the *Signal-*

"6. E.g., Judge Learned Hand's opinion in *Counsel of Western Elec. Tech. Employees—Nat'l* v. *Western Electric Co.*, 2 Cir., 238 F. 2d 892, 895.

"7. *Tenney Engineering, Inc.* v. *United Elec. Workers, Local 437*, D.C.D.N.J., 174 F. Supp. 878; *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283, United Rubber Workers*, D. C. D. Conn., 167 F. Supp. 817.

Stat opinion was cited with approval,[8] although several courts, in post *Signal-Stat* cases, have followed *Markel*.[9]

"8. *Butte Miners' Union No. 1* v. *Anaconda Co.*, D. C. D. Mont., 159 F. Supp. 431.

"9. *Lodge No. 12, Dist. No. 37, I. A. M.* v. *Cameron Iron Works, Inc.*, 5 Cir., supra, note 4; *International Union, UAW* v. *Benton Harbor Malleable Industries*, 6 Cir., supra, note 4; *Gay's Express, Inc.* v. *International Brotherhood of Teamsters, Local No. 404* D. C. D. Mass., 169 F. Supp. 834; *Structural Steel & Ornamental Iron Ass'n* v. *Shopmens Local Union No. 545*, D. C. D. N. J., 172 F. Supp. 354. The conflict between *Structural Steel, supra*, and *Tenney Engineering, supra*, note 6, has not yet been resolved by the Third Circuit." (R 45)

In addition to the cases cited by the Second Circuit, there have been two other decisions by District Courts in the Third Circuit prior to the original decision herein denying a stay pending arbitration in actions for breaches of a no-strike clause. *Harris Hub Bed & Spring Co.* v. *United Electrical Workers*, 121 F. Supp. 40 (M. D. Pa. 1954) and *Metal Polishers* v. *Rubin*, 85 F. Supp. 363 (E. D. Pa. 1949).

But, further, in addition to the companion case of *Sinclair Refining Co.* v. *Atkinson, No. 434*, since the original decision was issued and before it was withdrawn by the decision *en banc*, it was specifically cited and followed by a Court of Appeals and a District Court: *Vulcan Cincinnati, Inc.* v. *United Steelworkers*, 289 F. 2d 103 (6th Cir. 1961); *Yale & Towne Mfg. Co.* v. *Local Lodge No. 1717*, 194 F. Supp. 285 (E. D. Pa. 1961), *appeal to Third Circuit pending*.

Thus the First, Fourth, Fifth, Sixth and Seventh Circuits have held the breach of a no-strike clause not to be within the scope of an arbitration charge. This near universality of opinion clearly indicates that the breaches of the no-strike clause were just not intended to be covered by the arbitration provisions in a contract.

As pointed out by the decisions in *Sinclair Refining Co., Vulcan-Cincinnati, Inc.* and *Yale & Towne Mfg. Co., supra*, these decisions were in no way changed by the decisions of this Court in the three *Steelworkers* cases.[10] None of the *Steelworkers* cases changed the basic rule that the scope of the coverage of any arbitration clause is for the courts and not the arbitrator to decide. Since these earlier decisions rest only on the scope of the particular clauses involved they cannot be affected by the *Steelworkers* cases. Thus the Sixth Circuit in *Vulcan-Cincinnati, Inc., supra*, stated at pages 107, 108:

> "Defendant argues, however, that Benton Harbor and like decisions in other circuits should no longer be considered as controlling authorities in view of three cases decided by the United States Supreme Court in June of 1960, namely, United Steelworkers of America *v.* American Mfg. Co., 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; United Steelworkers of America *v.* Warrior & Gulf Navigation Co., 363 U. S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; and United Steelworkers of America *v.* Enterprise Wheel & Car. Corp., 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424. While, indeed, these decisions indicate that the widest scope should be given to arbitration as a means of settling and composing industrial strife, they are not in point with the issue before us. All of them have one basic difference from our case in that none of them involved the question of whether a violation of a no-strike clause of a collective bargaining agreement is an arbitrable issue. In each of these cases, the court was considering arbitrability of unsettled grievances initiated by employees or on their behalf by representatives of their Union.

10. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

> Although these cases extend the scope of arbitration, they adhere to certain well established principles. First, that no contracting party can be compelled to submit to arbitration any matter which he has not agreed to submit. United Steelworkers of America *v.* Warrior & Gulf Navigation Co., supra, 363 U. S. at page 582, 80 S. Ct. at page 1353. Second, the question of whether a particular matter is arbitrable is for the courts to decide. United Steelworkers of America *v.* Warrior & Gulf Navigation Co., supra, 363 U. S. at page 583, note 7, 80 S. Ct. at page 1353. Likewise, Justice Douglas supports the proposition that grievances, in situations with which we are dealing, relate to grievances of employees. At page 584 of Warrior & Gulf Navigation, 80 S. Ct. at page 1354, he says, "Every grievance in a sense involves a claim that management has violated some provision of the agreement." It cannot be said, therefore, that these cases and the principles enunciated therein conflict with our holding in Benton Harbor, nor do they change our conclusion that in the case before us a violation of the no strike clause was not a matter to be submitted to arbitration."

But, moreover, as we have discussed in Point I above, the *Steelworkers* cases, and particularly *Warrior & Gulf Navigation Co.* represent but one side of the coin. They merely enforced the quid pro quo that the union receives for entering into a collective bargaining agreement, namely, the arbitration of all disputes arising during the period of the contract. This case presents the other side of the coin, the quid pro quo that the employer receives, namely, the foregoing of the union's right to strike during the period of the contract. In the *Steelworkers* cases and *Lincoln Mills*, this Court protected the union's rights under this bargain. We now call upon this Court

to enforce the employer's rights under the very same bargain.

But furthermore, whenever a court has to consider the interpretation of language of a collective bargaining agreement, no matter how broadly or narrowly stated, it must always be guided by the basic realities of labor relations and the fundamental policy of preventing industrial warfare. This is particularly true whenever the basis for the court's jurisdiction is Section 301, a statute specifically enacted for the purpose of preventing industrial warfare.[5]

The importance of viewing the language in a collective bargaining agreement in such a context was recognized by this Court in *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956). In that case, an employer contended that an absolute no-strike clause without any possible qualification whatsoever, to wit:

> "5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement."

deprived a union of its right to go on strike in response to various unfair labor practices committed by the employer aimed at destroying the union's representational

5. "The Labor-Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements." *Charles Dowd Box Co.* v. *Courtney*, —— U. S. —— (No. 33, Feb. 19, 1962)

status. This Court rejected that argument, holding that despite the absolute nature of the no-strike clause there were certain qualifications implicit in it by the very nature of labor relations. In other words, it sustained the right of the union to strike under such conditions, unless the union explicitly abandoned its right to strike against an unfair labor practice by express language in the agreement.

The converse of this situation is presented here. Whereas the preservation of a union's integrity as the bargaining agent for a group of employees is the most fundamental concern of any union during the life of a collective-bargaining agreement, so the continuance of production uninterrupted by strikes is the most fundamental concern of any employer during the life of a collective bargaining agreement. Just as this Court held that a union did not abandon its right to strike (notwithstanding an absolute no-strike clause) in the face of an employer's attempt to destroy its bargaining status, without explicit language specifically stating such abandonment, so we submit it follows that an employer does not abandon its right to seek judicial redress (notwithstanding a broad arbitration clause), in the face of a union instigated strike in violation of the collective bargaining contract, without explicit language specifically stating such abandonment. Thus, even if we were to ignore all other indications that the arbitration clause was just not intended to cover breaches of the no-strike clause, we would be led to that conclusion by the fundamental statutory policy of maintaining industrial peace.

CONCLUSION

For all the reasons stated herein, the judgment of the Court of Appeals for the Second Circuit should be reversed, and this case remanded to the United States District Court for the Southern District of New York, for trial.

Respectfully submitted,

ROBERT ABELOW,
Attorney for Petitioner,
60 East 42nd Street,
New York 17, New York.

Of Counsel:

MILTON HASELKORN,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES.

Supreme Court of the United States

October Term, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

BRIEF ON THE MERITS FOR LOCAL 50, RESPONDENT

PAUL O'DWYER,
HOWARD N. MEYER,
50 Broad Street,
New York 4, N. Y.,
Attorneys for Respondent.

INDEX

Table of Cases Cited

Other Authorities Cited

Supreme Court of the United States

October Term, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, Local 50, American Bakery & Confectionery Workers International, AFL-CIO,

Respondents.

BRIEF ON THE MERITS FOR LOCAL 50, RESPONDENT

Opinions Below, Jurisdiction Etc.

Respondent is content with the presentation of the formal matters at pages 1-3 inclusive of Petitioner's brief. It would appear that the second of the Questions Presented has been abandoned by Petitioner and so it will not be discussed in this brief. The sole and remaining issue is whether Petitioner is required to arbitrate its claim that Respondent violated the no-strike clause in their collective bargaining agreement.

Respondent deems Petitioner's Statement of the Case inadequate and since it insufficiently reflects the record, respectfully submits the following

Statement

a. The Contract and practice under it. Respondent has been for more than fifteen years the collective bargaining agent for petitioner's production employees (R. 10). Their basic written agreement was last recodified in 1954 (R. 6). The agreement incorporates, by labor-management usage, certain past practices not expressly set forth (R. 29) and in one notable instance an arbitrator decreed that an *express* written clause was to be treated as inoperative on the basis of his finding as to such practice (R. 35-36).

The scope of the Arbitration clause is set forth in Article V(a) (R. 6). It extends to

> "all complaints, disputes or grievances arising between them involving questions of interpretation or application of
> any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly."

The written agreement requires designation of an arbitrator "upon the written request of *either* the Employer or the Union" (Art. VI(a); R. 7) whenever, no "mutually satisfactory adjustment" is reached by conference "within seven (7) days after the submission of the issue in writing" (Art. V(b); R. 7). In such case it is expressly provided "*either* party shall have the right to refer the matter to arbitration" (*id.*). The Arbitrator, once designated, is granted power to proceed and render a binding decision even "should *any party* fail, upon written notice, to appear." (Art. VI(d); R. 7)

The agreement also contains a clause providing that "there shall be no strike, boycott, interruption of work, stoppage, temporary walk-out, or lock-out" but expressly providing for non-liability of Respondent, "its officers, agents or members" if (a) the Union gives notice within twenty-four hours that "it has not authorized" the stoppage and (b) the Union "cooperates with the Company in

getting the employees to return and remain at work." (VII(a) and (b); R. 8; omitted in Petitioner's Brief.)

In August of 1959—in a prior grievance or dispute—Petitioner claimed that Respondent had conducted an "overtime strike" at its plant (R. 26).

Petitioner, complaining of this "strike", requested the designation of an Arbitrator by the N. Y. State Mediation Board (designating agency under the contract, Art. VI(a); R. 7) and asked that such arbitrator grant both "damages" and "injunctive relief" (R. 27). The State Board "as a matter of long-established administrative practice and routine handles arbitrations arising from claims of violation of various 'no-strike' clauses" (R. 28). It designated an arbitrator, describing the issue as "Breach of Contract and damages as a result of an overtime strike" (R. 28). Both parties appeared before the arbitrator, and the union claimed that because of deletion of a contract provision for "compulsory overtime" there was no arbitrable controversy as to the claimed existence of an obligation to work overtime (R. 33). After adjournment of the hearing,[1] the dispute was settled (R. 29, 34).

b. *The current dispute.* Prior to December 16, 1959, according to Respondent, "it had become part of the agreement established by past practice of many years, that the company's employees were not to be required to work" on the "middle of a three-day holiday week-end" (R. 25). Petitioner conceded "the company had not previously scheduled Saturday production" (R. 12).

The differences that led to this lawsuit arose when, on relatively short notice, the Petitioner elected, for the first

---

[1] Pending service of a "ten-day" notice, N. Y. C. P. A. § 1458(2) (R. 33-34). *Cf.*, as to vitality of state procedural rules in these matters *Charles Dowd Box* v. *Courtney* (Feb. 19, 1962, No. 33 O. T. 1961).

While denominated a Board of "Mediation" the state agency offers arbitration services as well, the arbitrators being paid by the State, see Book Review (1962), 62 Columbia Law Rev. 392,395, an example that might well be emulated in other jurisdictions.

time in at least fifteen years, to schedule Saturday production in the midst of what would otherwise have been a three-day holiday week-end (R. 15). This created immediate problems as to both December 26 and January 2: Christmas and New Year's Day of the 1959-60 holiday season each fell on a Friday.

Discussions and negotiations ensued (R. 25, 16-17).

As a result of these discussions and negotiations, held within the framework of the grievance procedure, a *modus vivendi* was established for the day after Christmas, the first problem to which the negotiators devoted their energy and attention. 80 out of 191 employees reported for work on *that* Saturday. Petitioner grumbled but did not characterize this as a "strike" (R. 16-17).

Having reserved its right to negotiate a "rate of pay for work done in such circumstances" (R. 25) Respondent submitted in writing, as required by the grievance procedure, and as a prelude to arbitration, its grievance as to the proper rate of pay for work done on December 26. This was not taken to arbitration because the contract required that seven days elapse after the submission in writing and by such time this action had begun (R. 35).

At a further grievance meeting and negotiation on December 28th, efforts to continue the *modus vivendi* and adjust or apply it for the problem of January 2d apparently broke down. Presumably petitioner demanded that more than 80 men come in (R. 17). It apparently withdrew the assurances of "no reprisal" that it had given for December 26th. On January 2nd, 1960, twenty-six out of the one hundred ninety-one production employees reported for work, a number which the Petitioner deemed insufficient for production (R. 18).

There was no evidence of any picketing, or any conduct by Respondent calculated to prevent its members from reporting for work on January 2nd. There was no evidence that the Petitioner requested or that Respondent re-

fused the posting of anti-wildcat notices pursuant to the limitation-of-liability proviso of Article VII(b)(a).

On the first business day succeeding the Saturday in question, this action was commenced—i.e., Monday January 4, 1960 (R. 1). The Company had not, of course, sought to "adjust" its "complaint, dispute or grievance" nor submitted a protest in writing, by demand for settlement, or otherwise. It had not demanded arbitration of its claim for damages, nor had the Union refused or had an opportunity to refuse to arbitrate the dispute.

Production has proceeded normally since January 4, without other interruption.

There were pending between the parties, as a result of the events of December 16-January 2nd, the following arbitrable controversies, of which the Mediation Board was advised, but which were not calendared pending disposition of this action:

1. The alleged strike or stoppage;

2. Violation, by Petitioner, of the contract, by filing this suit;

3. Rate of compensation for December 26;

4. Propriety of reprimands to shop committee;

5. Propriety of withholding holiday pay;

6. Fulfillment of 40-hour guarantee (R. 31).

Only the first of these inextricably interrelated issues is tendered by the pleadings in the action, the balance being subject to arbitration initiated by the Respondent.

Summary of Argument

1. The fundamental question to be determined when a party seeks to arbitrate a controversy is whether the contract relied upon provides for arbitration of the particular dispute. The arbitration clause of the Drake-Local 50

contract is so comprehensive and clear in its wording that it cannot be rationally argued that it was not intended to cover disputes about compliance with the no-strike clause. Moreover, the procedural provisions of the arbitration machinery permit the employer to file a "complaint". Since the no-strike clause is the one the employer would be most likely to make a claim under, this arbitration clause, expressly open to invocation by the employer, was clearly intended to cover such dispute. This very employer has used the arbitration machinery under this very contract with respect to an asserted violation of the no-strike clause. Petitioner has not met the burden of demonstrating non-arbitrability.

2. Petitioner's argument that arbitration provides an inadequate remedy for violation of the no-strike clause is not supported by authority or history. Even if it were, it would not justify a Court's overriding the express agreement of the parties. Arbitration is not only more suitable but may, in a proper case, be a more effective remedy for an interruption of production. Moreover, the arbitration machinery could have been used, if Petitioner had acted in good faith, to secure a declaratory ruling which would have made this dispute unnecessary. The Court should encourage the use of the arbitration machinery for advisory rulings in such circumstances. In any event, Petitioner's tactics, calculated to impose its will on its employees, heedless of whether it is thereby provoking ill will and tension, should not be countenanced.

3. Petitioner's argument that Respondent waived its right to arbitration of the dispute over alleged violation of the no-strike clause is unfounded. It is an argument in a circle, for it assumes as a condition to the Court's jurisdiction that there has been a violation and in this case, there is a dispute as to whether there was a violation. Nothing that the Respondent said or did on this record could be construed as a waiver of its right to submit to

arbitration its contention that the no-strike clause was not violated. Petitioner, moreover, confuses the question of waiver of arbitration of the initial grievance and waiver of arbitration of the later stoppage. There was, in any event, no waiver of the right to arbitrate either such dispute in this matter.

ARGUMENT

I

The Arbitration Clause Should Be Enforced as Written.

The issue of fundamental importance presented by this case is whether an arbitration clause in a collective bargaining agreement is to be enforced as written where its language is plain.[2]

On the face of the Drake contract a rational argument cannot be made that a "complaint" or "dispute" over alleged violation of the No Strike clause was excluded from the arbitration clause.

This very Petitioner, in another, prior, dispute with this Respondent, sought and found a remedy by calling on the New York State Board of Mediation to designate an Arbitrator in the case of an earlier, alleged "overtime" strike (R. 26-28, 33-34). That dispute was settled, by negotiations, after one meeting with the arbitrator (R. 29).

An eminent arbitrator and attorney, writing with the responsibility of attorneys acting as *amici curiae*, said of the Drake clause: "No broader clause than the one con-

---

[2] The question presented does not involve the merits of the federal court complaint filed by Petitioner; it involves solely the merits of Respondent's motion to compel arbitration, which resulted in an order by Chief Judge Ryan staying the action pending such arbitration (R. 23, 22).

tained in the collective agreement now before the Court could be written" (Prof. Herman Gray and Judge Edward Maguire, for New York State A.F.L.-C.I.O., as *Amicus Curiae* below, br. p. 3).

The language of the clause warrants the characterization (R. 6-7).

In the first place, even if the word "grievance" is, as some courts have held, a word of limitation, that limitation is here inapplicable: the subject phrase is "all complaints, disputes or grievances."

In the second place, there is evinced an intention that arbitration be employed not only when there is a question of "interpretation or application" of any "clause" of the contract; it extends also to any "matter covered by this contract", whether or not specifically written into any clause.

The parties then went beyond that, to include complaints or disputes that might involve "any act or conduct or relation between the parties hereto."

Finally, as if their intention were not already unmistakeable, they added, probably unnecessarily: "directly or indirectly."

Not only is their intention made plain in the scope clause; it is also quite evident from the procedural clauses that the employer may, and is expected to, grieve, dispute, or complain, when it sees fit, under the arbitration machinery. The "issue involved" is to be submitted in writing "by the party claiming to be aggrieved to the *other* party." If there is no adjustment "*either* party shall have the right to refer the matter to arbitration." The designation of the arbitrator by the State Board is to be made "upon the written request of *either the Employer* or the Union."

The whole thrust and burden of Petitioner's argument is that a no-strike clause is "the only consideration he re-

ceived from the agreement" (Br. 7, 12, 19, 25, 34). If that were so, then presumably, impairment of that consideration is the only "grievance" or "complaint" that is likely to be tendered by the employer. The arbitration clause clearly contemplates the adjustment or arbitration of grievances or complaints which may have been initiated by the Employer, and the designation of an arbitrator "upon the written request of * * * the Employer" (R. 7). What would an Employer want to take to arbitration besides a complaint of violation of the no-strike clause?

The Petitioner nowhere in its brief discusses the actual wording of the arbitration clause here involved, nor does it attempt to explain why such wording was not intended to comprehend just such a dispute between the parties as to (1) what occurred on January 2, 1960, and (2) whose fault it was. With a candor compelled by the language of the clause, Petitioner argues for reversal for various reasons of supposed policy "irrespective of the scope of the arbitration clause" "irrespective of the rationale" and "irrespective of the broadness of the grievance and arbitration provision" (Br. 25). The Court is asked in effect to rewrite the arbitration clause to insert the proviso "except where an employer *claims* that there has been a violation of the no-strike clause."[3] We emphasize the word "claims" because in this case it is denied that there has been such violation (R. 23, 29).

In the entire period between *Colonial Hardwood* (168 F. 2d 33; 1948) and the first (withdrawn) *Drake* de-

---

[3] In a brochure entitled "Model Arbitration Clauses to Protect Management Rights" distributed by the Labor Relations and Legal Department of the Chamber of Commerce of the United States (publication No. 560-051) (Sept. 1961) employers are urged to *bargain for* a no-strike clause containing a paragraph:

> "The provisions of this Article shall not be appealable to arbitration either for the purpose of assessing damages or securing specific performance, such matters of law being determinable and enforceable in the Courts."

Needless to say, in this litigation, this Petitioner is seeking to win such a clause without having to bargain for it.

cision below (287 F. 2d 155) no court went so far as to hold that a no-strike dispute was not within the language of such a broad arbitration clause as that contained in the *Drake* contract. In *Colonial Hardwood* itself, progenitor, as it were, of the line of cases of which the withdrawn opinion represented the extreme extension, the court took pains to note: "it would have been possible, of course, for the parties to provide for the arbitration of any dispute which might arise between them; but they did not do this * * * " (168 F. 2d at p. 35).

Subsequent to the grant of certiorari in this case and in No. 430, the Court of Appeals for the Third Circuit decided *Yale and Towne Mfg. Co.* v. *Local 177*, — F. 2d —, 49 LRRM 2652. The contract language there is not as broad as that in ours, but it is and was held to be broad enough ("either party may invoke the grievance procedure in the consideration of any difference * * * "). The majority and the dissent agreed on one proposition: "The arbitrability of a difference depends on the particular provisions of the agreement. It is a matter of contract and what the parties intended" (per Staley, C. J., for the court). "The narrow question which a court may consider in a collective bargaining agreement containing an arbitration provision is whether the parties seeking arbitration are making a claim, which, on its face, is governed by the contract" (per Gamey, C. J., dissenting).

This Court was quite explicit in *Warrior*:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."
>
> * * *
>
> "Is the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to ex-

> clude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." (363 U. S. at 582, 584-5)

In the present *Drake* case, there is no exclusion clause at all. There is nothing in the withdrawn opinion of the Court of Appeals that explains or justifies its conclusion that "a breach of Article VII is not within the scope of Article V". Such conclusion simply cannot be reconciled with the guidelines of the *Steelworkers' cases,* 363 U. S. 564 ff., that had been decided six months before. It is not an unfair appraisal of the withdrawn opinion to suggest that it was the culmination of a line of cases in some Circuits, explicable primarily by "lack of sympathy for policies favoring arbitration over litigation" (Note, 13 Ind. L. J. 473, 477).[4]

II

The objective of industrial peace will not be advanced by accepting Petitioner's theory nor by countenancing its tactics.

In Petitioner's argument that it should be allowed to select a forum other than that agreed upon between the parties "irrespective of the scope of the arbitration clause" its principal theme is that a decision in its favor "will strengthen industrial peace" (Br. 9).

The premises are (a) a dominant Congressional purpose in enacting Section 301 was to stabilize industrial relations *and* (b) "the right of redress before an arbitrator" does not provide any effective deterrent "against * * * violation of a no-strike provision." The conclusion or

---

[4] The panel that decided *Signal-Stat* v. *Local 475,* 235 F. 2d 298, cert. den. 354 U. S. 911, was different in composition; *cf. Markel* v. *U. E. & M. W. A.,* 202 F. 2d 435.

inference is that "the only effective deterrent against the flouting of the machinery * * * is for a Federal District Court * * * to enforce the no-strike provision."

Even assuming this two-pronged argument were based on firm foundation, it would be hard to see what justification a court would have to override an *express* agreement of the parties that all their differences be adjusted or resolved by arbitration. In fact, however, the second half or prong relied upon is tinsel.

The opinion of a single writer in a law review (who thinks "probably" an arbitrator "is not the proper person" (br. 18) is all that Petitioner offers and that is hardly enough of a showing on which to erect the superstructure of Petitioner's argument.

One cannot quarrel with the Petitioner's lengthy and somewhat repetitive insistence that "the grievance and arbitration machinery is provided by a collective bargaining agreement in order to prevent the settling of grievances through industrial warfare" (br. 8). But one must differ with the most unwarranted assumption that arbitration machinery will not suffice for dealing with a grievance or complaint such as this Petitioner makes about this Respondent.

The assertion that the arbitration machinery is ill-fitted or inadequate for dealing with its "grievance", "dispute" or "complaint" that there was a contractually forbidden stoppage is not justified. There is no warrant in the history of this type of dispute for the slur on arbitration and arbitrators implicit in Petitioner's position. History proves the contrary.

At the very moment when the initial panel of the Court of Appeals below was considering Petitioner's appeal from Chief Judge Ryan's decision, the New York Court of

Appeals was deciding *Matter of Publishers Association (N. Y. Stereotypers)*, 8 N. Y. 2d 414. The grievance machinery there involved provided for a Joint Conference Committee to which "shall be referred for settlement any matter arising from the application of this agreement if such matter cannot be settled by conciliation between the Union and the Publisher involved." It was claimed by the Association that there had been a brief work stoppage at the plant of the New York Times. The union there declined to arbitrate the question of damages, resulting in the proceeding to compel arbitration. The Court of Appeals by Chief Justice Desmond wrote:

> "We know that innumerable arbitrations of damage questions are held pursuant to arbitration agreements which do not directly mention 'damages'. No reason appears for a different result here. * * * The landmark arbitration case of *Matter of Marchant* v. *Mead Morrison Mfg. Co.*, 252 N. Y. 284, 298-9 says that an agreement in a contract that all controversies growing out of it should be arbitrated—or any equivalent agreement—authorized the arbitrator to assess damages."

Here is an example, at its best, of state law "compatible with the purpose of Sect. 301" that "may be resorted to in order to find the rule that will best effectuate the federal policy", *Lincoln Mills*, 353 U. S. 448, 457.

Respondent's moving affidavit asserted, without contradiction, that the New York State Mediation Board "as a matter of long-established administrative practice and routine handles arbitrations arising from claims of violation of various 'no-strike' clauses" (R. 28). A casual glance at one of the popular collections of labor arbitration decisions will show that arbitrators have been repeatedly called upon to grant damages or other remedies, in such situations—and have done so when the facts require it.

E.g.:

Oregonian Publishing Co., 33 L. A. 574;
Hoffman Beverage Co., 18 L. A. 869;

Motor Haulage Co., 6 L. A. 720 (enf'd 272 App. Div. 382;
Paramount Printing & Finishing Co., 13 L. A. 143;
Newark Newsdealer Supply Co., 20 L. A. 476;
Canadian General Electric Co., 18 L. A. 925;
Merchants Frozen Food, 34 L. A. 607.

Petitioner bases its bold statement that if a "Section 301 action for a breach of a no-strike clause may be stayed, pending arbitration, then Section 301 is absolutely meaningless to effect its primary purpose—the deterrence of industrial strife" on the proposition that "an arbitrator cannot effectively impose a severe sanction" (br. 16-17). Ignoring the cases cited above, this key assertion they base on the judgment of one writer,[5] calling his opinion "these realities" (br. 18).

As opposed to Mr. Lowden's view, we can cite an equally careful student, who concluded:

> "The working-out of effective and workable means of enforcing no-strike provisions is necessary to the enforcement of collective bargaining agreements as contemplated under Section 301. To be effective, such enforcement must be consistent with the scheme of industrial government which has been evolved under collective bargaining agreements. This requires that arbitration be accorded the central place in the adjudication of breaches of no-strike provisions, as well as of other provisions of the agreement." *Richard A. Givens*, "Section 301, Arbitration, and the No-Strike Clause" 11 Lab. Law Journ. 1005, 1021.

---

[5] Lowden, Labor Arbitration Clauses, 43 Va. L. Rev. 197, Petitioner omits to state that Mr. Lowden's article is a discussion of draftsmanship and that the writer, in portions of the paragraph preceding and following its quotation, states: "It is doubtful if the employer desires the right to institute arbitration * * *. If the employer can arbitrate, he may find that he must exhaust that remedy before some courts will act" (op. cit. at 202-203).

One consideration that applies with great force to the events here involved has been noted by another student of the problem.

> "The arbitrator's decision can do much to relieve the strained feelings and discontent which will be the result of litigation, no matter which side is victorious. The strike provokes bitterness and rancor between employer and employee, both of whom feel themselves wronged. A time consuming, technical and costly court battle can only further this animosity", Note, *Arbitration of No-strike Clause Breaches,* 31 Ind. L. J. 473, 486.[6]

To the effect that in a proper case an arbitrator can deal more vigorously and not merely more understandingly with this type of dispute, see *Matter of Ruppert* v. *Egelhofer,* 3 N. Y. 2d 576, holding that it is not a violation of New York's anti-injunction law for a court to decree enforcement of an award restraining a strike.

Viewed in retrospect, the events with which this case is concerned give eloquent demonstration that all is not black and white in these matters, even when a partial or limited stoppage occurs.

It is as important—if not more important—that a strike or stoppage be not provoked, as it is that it not occur.

It is essential to recognize that in a free society a union does not exist to coerce men to work against their will; that workers are human; that there is an emotional element in a "wildcat" stoppage (from which the union and its paid officials do not stand to gain); that in this very case the Petitioner could have, but did not, make thoughtful

---

[6] It is also important to note the observation of this writer that "the creation of a competing forum in the federal courts under Section 301 has threatened to break down the voluntary system" which, if properly adhered to, points "the way to continuity of production, which must be the goal of both parties" Loc. Cit. at p. 475.

If there be any relevant policy argument, it is that "the means chosen by the parties for settlement of their differences" should be "given full play," *United Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564.

and constructive use of the grievance and arbitration machinery which would have taken account of that emotional element, and would have avoided the minor episode of one-day absenteeism that did occur.

Consider the facts: assuming the validity of the Petitioner's economic reasons for wanting to depart from the past practice of not scheduling work during a three-day holiday weekend, there is nothing to indicate that its decision to make the change was a sudden response to an emergency problem. It is a fair inference from the employer's affidavit that it knew long before December 16, that it would like to experiment with the novel idea of production on Saturday following Christmas and New Year's. The days on which these holidays fell on the calendar was known to management all year long.

An arbitrator is fully qualified to render a declaratory ruling, advising the parties (after hearing the facts, examining the contract, and reviewing the past practices) as to just what their rights and obligations may be. There is no reason to be found in this record which will justify the failure of the employer, whose intent and desire to change a past practice of upwards of fifteen years' standing remained its secret until December 16, to attempt to secure the union's agreement sufficiently in advance of the date of the change so as to make it possible to secure a final and binding arbitration award if there had been a disagreement.

This course of procedure would have been an appropriate use of the grievance machinery as the "heart of the system of industrial self-government." As this Court pointed out in *Warrior*:

> "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for this solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance

machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement * * *. The grievance procedure is, in other words, a part of the continuous collective bargaining process."

Petitioner, however, chose to employ a different approach. Its technique was one calculated to avoid a declaratory arbitration. It served its notice, cancelling work on December 24th and requiring work on the 26th, on December 16th. Even if the grievance discussion had been exhausted on the 16th, the Respondent could not have *asked* the appointment of an arbitrator until the 23rd, seven days later, as required by Art. V(b). The calendar of the State Mediation Board, it may be fairly assumed, was such that no hearing could have been had until after December 26, and probably not until after the first of the year, in view of the holiday period—which arbitrators, lawyers and judges celebrate more widely than bakers.

Petitioner, in other words, deliberately sought to make the negotiations over the change of practice a game of maneuver, a test of will, a gamble that its employees would submit to the change, faced, at their peril, with a charge of "strike" or "insubordination" if they did not submit.

For men who had been accustomed to a privilege and benefit of enjoying a rare three-day week-end, it would have been small solace to have an arbitrator tell them afterwards, if they had submitted, that they had not been required to. Even an award of premium pay would not have made whole those whose emotional investment in the three-day weekend was one that could not be salvaged by a few cents an hour. Neither a lawyer, nor a judge can say that it is foolish or unjustified for a baker to set great store by the prospect of three consecutive days away from the oven, or the packer from the conveyor belt.

It was in this setting, with a rank and file group at an emotional pitch, and under the stress of a deadline, that

Petitioner forced Respondent's officials to negotiate, within a brief period, about a change of a fifteen-year practice. They did remarkably well. They worked out a standby arrangement whereby Drake would not discipline those who did not show up the day after Christmas, if enough employees reported to meet the needs of production. 80 out of 191 showed up—and Petitioner does *not* call it a "strike".

The employees remained unenthusiastic. The standby arrangement did not solve the January 2nd problem. The record does not show to what extent this was due to Petitioner's intransigeance. 26 instead of 80 employees showed up January 2nd—and Petitioner chooses to call it a "strike".

What is evident from all this is that Petitioner did not want to secure and Respondent never had an opportunity to secure an arbitrator's advance ruling as to the propriety of Petitioner's proposed change; Petitioner carefully and deliberately timed its conduct so as to avoid such a ruling and to create the maximum possible tension and disharmony in making its change of schedule. There is no evidence that the Respondent instigated or encouraged the multiple absenteeism alleged; the evidence *is* overwhelming that Petitioner provoked it.

After a glance at these, the actual facts, the arguments of Petitioner about "promoting industrial peace" may be given a second look. To the extent that industrial stability was jeopardized at Drakes in 1959 the fault can be placed only at the door of those who so conducted themselves as to make it impossible for an arbitrator to pass, in advance, on a proposed change of practice that had become imbedded in the relationship of the parties. Without such an advance ruling, the employees had ample justification for believing that a valued benefit was being taken away without contractual justification.

Having by-passed the grievance machinery when it sought to institute the change of practice, Petitioner, crying "strike", seeks to by-pass that machinery once more, and rushes to a forum which it thinks will be more hospitable in its effort to destroy the "practice of the industry and the shop"—the "industrial common law" rule—that its employees believed, in good faith and with good reason, forbade it from scheduling work on Saturdays. It will thus, if permitted, avoid a ruling by the forum agreed upon by the parties, as to its right to make the change. All this is done in the name of industrial peace. Petitioner's purpose is as unfair as its protestations are hypocritical.

The talk of "*quid pro quo*" is meaningless in this situation. The Petitioner so conducted itself as to prevent calm negotiations and a useful adjudication of its claimed right to schedule Saturday production *prior* to the event. It gambled on its ability to impose its will by threat of punishment for insubordination, as against the individual employees, and threat of suit, as against the union. Its summons and complaint were drawn and ready for filing on the first business day after January 2nd. Having embarked on a game of ruthless maneuver, wholly abhorrent to the concept of industrial self-government, it cannot now be heard to say that it has received less than it bargained for. It seeks "Judicial redress" for events that were solely the consequence of its own acts which aborted the grievance and arbitration machinery.[7] That machinery remains, as provided by contract, available to test out its "complaint" about the "conduct" of the Respondent and its members.

---

[7] While Respondent insists that it can demonstrate to the satisfaction of an arbitrator that *there was no strike,* we believe that the following analysis is apt:

> "In view of the relationship between the parties and the complex nature which their disputes possess, every issue is relevant in determining responsibility. The purpose of the no-strike clause is continuity of production through union responsibility. It should not be used to allow irresponsible management to saddle strike costs on a union which struck because it had no other alternative." 31 Ind. L. J. at 485.

III

The Stay Cannot Be Denied on the Mere Assertion That There Was a Strike January 2d.

Petitioner's remaining contentions may be summarized in its own language: "the unique importance of a no-strike clause" requires the conclusion that it is "so fundamental a breach of the grievance and arbitration clauses that it should not be allowed to involve these clauses to protect it from judicial sanctions against the very same violation" (Br. 8). It suggests that "whether the legal rationale is denominated waiver, default, estoppel or some other characterization • • • the Union should not be allowed to invoke the very machinery it has violated" (br. 20-21).

The difficulty with and the inherent fallacy in this approach is that it assumes in advance the very finding which the tribunal is asked to make.

On the record in this case, particularly, the reasoning is seen to be specious. The allegation of the complaint that Respondent "authorized, instigated and encouraged" Petitioner's employees to "engage in a strike, a concerted stoppage" (R. 4) is categorically denied in the motion for a stay (25, 29). Is the arbitrator to be ousted of jurisdiction on petitioner's mere assertion that there has been a violation of the no-strike clause?

The parties agreed that *all* complaints or disputes involving questions of interpretation "or any act or conduct or relation between the parties hereto, directly or indirectly" if unresolved by negotiation, were to be determined by a particular forum—the arbitrator. There is no warrant in statute for the result for which petitioner contends, namely, that it need only claim that there was a violation of the clause and that such claim, without more, will enable it to avoid arbitration.

The complexities of industrial relations and the wide variety of factual problems that may arise to tax or test the resources of industrial self-government give ample reason why such a result should not be permitted. A shift in a department may be reluctant to start work for a few minutes if it arrives to find a new machine has been installed. A group on a loading platform may disobey its foreman when, unexpectedly, it finds teamsters participating in the loading. The discontinuance of the practice of permitting a coffee-break may create turmoil for a period of time. There is need "for flexibility in meeting a wide variety of situations" (*Enterprise* at p. 597).[8] The imagination of a mere lawyer, who has never worked in a modern industrial plant, is inadequate to forecast the variety of situations that may result in brief and more or less troublesome stoppages of production. To prevent such stoppages is the task of responsible union leadership and responsible management. They share as well a mutual interest and obligation in terminating them when they occur. The "wildcat" is more of a headache to the Union leader than to the managers of the enterprise, particularly where the underlying causes may well prove to have involved a provocation by the latter.

All this is urged not to condone or justify interruptions of production, or stoppages or refusals to work that are not really "strikes". It is presented to illustrate the inevitable difficulty inherent in petitioner's basic premises: that the *mere assertion* in a complaint (1) that there has been a strike and (2) that it was in violation of a no-strike clause, is enough to warrant subjecting unions to the whole panoply of procedures, pleadings, depositions, motions and ultimate formal trial in the federal court. Nor, correspondingly, is it enough to justify saddling the clogged dockets of the federal courts with such actions.

---

[8] *United Steelworkers* v. *Enterprise W. & C. Corp.*, 363 U. S. 573.

The facts in the present case are sufficiently illustrative of the hazardous consequences of accepting petitioner's reasoning. In a conventional sense there was no "strike". "A strike is a cessation of work as a means of enforcing compliance with some demand upon the employer" 40 Words and Phrases 309. Here there was no demand, no picketing, no threats, no ulterior purpose sought to be achieved. There was a mere failure to come to work, for one day, by employees who, with at least a colorable justification for so believing, did not regard themselves as obligated to come to work. They did come to work on the next business day—without benefit of injunction, summons or complaint; they made no demands, directly or indirectly, while they were out (34).

The mere occurrence of a stoppage or interruption of production does not mean, without more, that there has been a violation of the "no-strike" clause by the contracting union. The facts of industrial life are ignored in Petitioner's presentation. As Mr. Richard Givens wrote, in "Section 301, Arbitration and the No-Strike Clause", 11 Lab. Law Journ. 1005, 1011-12:

> "The purpose of no-strike provisions in collective agreements—continuity of work during the contract term—may be frustrated by action of the contracting union, by outside unions, or by the employees themselves apart from any union. The appropriate means of enforcement and the corresponding limitations of responsibility must be considered in each instance."

Reference to the precise wording of the Drake-Local 50 "no-strike" clause is also appropriate. Union liability is quite carefully limited, and the broad language of Article VII(a) must be read in the light of the limitations of Article VII(b) (R. 8). Respondent is immune from damages whenever it gives written notice within twenty-four hours after the beginning of the stoppage that "it has not authorized it" and cooperates with the Company in getting the employees to return. An initial question of law is

presented as to whether, in the face of such clause, there can ever be union liability where the stoppage is, as this one was, of less than twenty-four hours duration. (This is not to concede that there was a "strike" or "stoppage" as contemplated by the contract.) Perhaps the Union could have raised that question by motion for summary judgment—if it had not consistently taken the position that it was in the wrong forum to start with. The record moreover—in the petitioner's own affidavit—shows cooperation by the union in an effort to cope with the morale problem created by Petitioner's brinkmanship in handling this episode.

How can the Respondent be held subject to doctrines of "waiver, default, estoppel" when it was actively on the scene, trying to resolve the dispute by negotiation (R. 16), demanding arbitration when an impasse was reached (R. 25) and prevented by petitioner's own conduct from securing the therapeutic effect of an arbitration hearing before the crucial days in question?

The Court of Appeals for the Third Circuit—in a more realistic opinion than any that have dealt with this type of question—pinpointed the difficulties with Petitioner's position. The Court wrote, in *Yale & Towne*[9]:

> "The union is not under an absolute duty to prevent a strike, and the mere fact that one takes place does not necessarily make it liable to the company * * * it may be necessary to determine whether the company, in light of the record, deliberately provoked the alleged strike. These are questions which, under the circumstances, involve the merits of the controversy, and may best be answered by examining the total employer-employee relationship as manifested through the collective bargaining agreement * * *.
>
> "* * * the question here is not merely to determine whether a strike took place. Resolution of that question may well raise collateral problems involving past practices and recognized responsibil-

[9] F. 2d , 49 LRRM 2652, 2654 (Feb. 14, 1962).

> ities of the parties insofar as a work stoppage is concerned. That, in turn, may require an examination of the bargaining history and grievance settlements, which admittedly we cannot do."

Even were there room for application of doctrines of waiver here, there is an important distinction to be made. Is the claimed waiver one of the right to arbitrate the initial grievance—the rescheduling—or of the right to arbitrate the subsequent complaint—the alleged "strike"? Conceivably the former can be waived, when a union strikes, and admits it has struck, without seeking to arbitrate the underlying grievance. Whether there has been such waiver, however, is necessarily a question for the arbitrator, when the clause is as broad as that here involved.[10]

Waiver of the right to arbitrate the question of alleged violation of the no-strike clause, however, is unthinkable on the facts here involved. No effort was made by Petitioner to negotiate the claim for damages; there was no refusal by Respondent to arbitrate. While the Respondent was still attempting to use the grievance machinery with respect to the underlying controversy, Petitioner rushed into court without advance notice, protest or demand, seeking, in effect, to bring about judicial pre-emption of the entire matter.

The motion to stay by Respondent was an appropriate answer, and in reply to the motion, no facts were furnished on the basis of which a court could say the union had disqualified itself from access to the arbitration tribunal. The ultimate availability of "judicial redress" for Petitioner remained: had it gone to arbitration, and prevailed, it could have moved in the action, theretofore stayed, for

---

[10] If, in *Local 174* v. *Lucas Flour Co.* (March 5, 1962; No. 50, O. T. 1961), the union waived arbitration, it may have done so by choice, or by lack of alertness in failing to move for a stay. That case reserves the question here involved (30 L. W. 4170-71):

> "problems [may arise] in specific cases as to whether compulsory and binding arbitration has been agreed upon, and, if so, as to what dispute have been made arbitrable. But no such problems are present in this case."

confirmation of the award. An order confirming an award is, as Judge Learned Hand has pointed out, judicial redress:

> "* * * a stay presupposes that the action shall not abate; and if it does not it must go to judgment of one kind or another. If a defendant wins before the arbitrators, he must be able to clinch his victory by a judgment; on the other hand, having invoked arbitration, he must also abide the result, if he loses."

Murray Oil Products v. *Mitsui & Co.*, 146 Fed. 381, 383.

CONCLUSION

The judgment of the Court of Appeals, *en banc*, should be affirmed.

Respectfully submitted,

PAUL O'DWYER,
HOWARD N. MEYER,
Attorneys for Respondent.

Supreme Court of the United States

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner.

AGAINST

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondent.

BRIEF OF THE NEW YORK STATE AFL-CIO *AMICUS CURIAE*

EDWARD MAGUIRE,
50 East 42nd Street,
New York 17, N. Y.

HERMAN A. GRAY,
551 Fifth Avenue,
New York 17, N. Y.

Counsel to the New York State AFL-CIO.

INDEX

CASES CITED

Supreme Court of the United States

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner.

AGAINST

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondent.

BRIEF OF THE NEW YORK STATE AFL-CIO *AMICUS CURIAE*

This brief is submitted by the New York State AFL-CIO as *amicus curiae* with the consent of the parties.

I

The Interest of the New York State AFL-CIO.

The New York State AFL-CIO is a federation of labor unions in New York State. It is composed of more than two thousand affiliated unions having a total membership in excess of two and one-half million.

The New York State AFL-CIO does not engage in collective bargaining and has no direct relationship with employers. Nevertheless, one of its stated purposes is to promote collective bargaining and to safeguard the

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

REPLY BRIEF FOR PETITIONER

ROBERT ABELOW,
Attorney for Petitioner,
60 East 42nd Street,
New York 17, New York.

MILTON HASELKORN,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES,
Of Counsel.

collective agreement. It is unreservedly committed to the proposition that in a free economy and in a democratic society labor relations can best be conducted through a collective agreement voluntarily arrived at and faithfully adhered to. This position is in accord with our national policy enunciated in the National Labor Relations Act.

Experience teaches that an arbitration procedure is vital to the functioning of the collective agreement. If the collective agreement were to be left in the hands of the courts for interpretation, application and redress it would fail as a workable institution. This is not being said out of a lack of respect for or confidence in the Courts. It is simply that the successful administration of the collective agreement calls for a specialized treatment, a flexibility, a speed and an economy which our judicial procedure is not geared to give, evolved as it has out of a different history to serve different purposes.

> "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." (*United Steel Workers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582, 80 S. Ct. R. 1347, 1353.)

In that respect the collective agreement is much like the great body of modern social and regulatory legislation. Here too experience has taught that the effective operation of these measures cannot be achieved through the normal judicial processes. They have therefore been entrusted to specialized agencies that can give them an expertness freed of rigid formalism without which they could not function.

The New York State AFL-CIO sees in the petitioner's position a serious blow at labor arbitration. No broader

clause than the one contained in the collective agreement now before the Court could be written. The parties have agreed to submit to arbitration "all complaints, disputes or grievances" involving "any clause or matter covered" by their agreement and "any act or conduct or relation" between them. If that language is held not sufficient to keep every phase of the agreement out of the courts then defeat must be acknowledged. Then it must be said that no matter what may be the wording used, in the end it will prove futile. By one device or another, by one line of reasoning or another, one of the parties will always find the way to escape its clear commitment and to involve the other in the expense, the delays and the technicalities of litigation. In point of fact, the more subtle the reasoning, the finer the hair-splitting, the greater the uncertainty and confusion that will be injected and the deeper the hurt to the collective agreement.

Therein lies the reason for the concern of the New York State AFL-CIO.

II

Petitioner's case rests on an assumption of facts and an interpretation of the collective agreement which it is for the arbitrator to find and to make.

Petitioner's argument rests on this premise—the respondent violated the no-strike clause and, therefore, petitioner may seek redress in court. But this begs the issue. It assumes as already established the very thing which is yet to be established.

Whether respondent violated the no-strike clause is first of all a question of fact. Just exactly what did the em-

ployees do? Just exactly what did respondent do, to what extent, if any, in what manner and to what degree did respondent participate, aid or abet? These facts once established it would then become necessary to determine whether or not they constituted a breach of the collective agreement. That would necessarily entail a construction of its provisions. This is inescapable. It is impossible to sustain petitioner's allegation of a violation of the no-strike clause without reference to the agreement and without applying its provisions to the facts as found. But that falls squarely within the arbitration procedure which expressly states that "all complaints, disputes, or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract" shall be submitted to arbitration.

III

There is no warrant for giving the no-strike clause an importance greater than any other in the collective agreement.

Repeatedly petitioner asserts that the no-strike clause holds a unique position in the collective agreement. So that a charge that it has been breached can be taken to the courts without need of submitting it to the arbitration procedure set up for the disposition of all other disputes that may arise under the agreement. Reflection will show that no such absolute special quality can be assigned to any part of the collective agreement. The value of each of its provisions varies not only with the person affected but with the circumstances.

It may be conceded that ordinarily the no-strike clause is of foremost importance to the employer. But that is

not always so. Given a time of sharp business decline or unusually heightened competition and the wage structure, the scheduled tours of duty and the methods of production become the prime center of his concerns. Under such circumstances conduct on the part of his employees which he considers to be in violation of the contractual provisions covering these areas will pose a threat to the continued well-being of his enterprise much greater than that of an illegal stoppage.

For the union, on the other hand, the union security clause is the heart of the collective agreement. Upon this depends its bargaining strength, its power of internal discipline, at times its very existence. A breach of the no-strike clause may do great injury to the employer, continued disregard of the union security clause would in the end destroy the union. With reason the union could argue that if the first is entitled to redress at the hands of the court in disregard of the arbitration procedure then surely the second is entitled to like treatment.

The stipulated wages are normally of first interest to the workers. However, in a time of depression and wide layoffs seniority takes prime place since it determines the right to hold the job. In such a time, the employees could not be blamed if they were to regard what they consider the employer's departure from the seniority provisions as destructive of the economic security which for them is the essence of the collective agreement.

Give to any provision a special status which exempts it from arbitration and the same will have to be done again and again as other interests and circumstances dictate. The result will be that the arbitration machinery set up by the collective agreement for its orderly administration will be riddled by exceptions to the point of nullity.

The collective labor agreement is an integrated whole. No one clause has primacy. Each has its function to perform in interrelation and in interreaction with the others. Arbitration is built in as an essential part. Its purpose is to apply general provisions to the specifics of particular situations, to shape a document with the unavoidable inadequacies and ambiguities of written language into an effectively operating instrument. For the achievement of this purpose the arbitration machinery must have authority over every aspect of the agreement. To truncate its scope, to keep some part of the agreement out of its jurisdiction would becloud its status and weaken its ability to serve. This may be of narrow, immediate advantage at a given moment to one or the other of the parties but in the end it would do injury to them all.

We again quote from the opinion of this Court in *United Steel Workers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 584; 80 S. Ct. R. 1347, 1353:

> "In the absence of any express provision excluding a particular grievance from arbitration, 'we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."

IV

The arbitrator is possessed of adequate power fully to redress the wrong, if he were to find that petitioner was wronged.

Petitioner is mistaken when it argues that the arbitrator could not impose a sufficiently effective sanction were he to conclude that the respondent did actually violate the no-strike clause (Brief, p. 17).

Squarely in point is the holding of the Court of Appeals in New York (the jurisdiction in which this arbitration proceeding would take place) that the arbitrator may award damages in a case arising out of an employer's charge that there was a breach of the no-strike clause (*Matter of Publishers' Association*, 8 N. Y. 2d 414). The same Court sustained an arbitrator's award which enjoined a strike in violation of the collective agreement (*Ruppert* v. *Egelhofer*, 3 N. Y. 2d 576).

So that if petitioner will succeed in persuading the arbitrator that there was a violation of the no-strike clause it can obtain from him the very same relief it could get in court—damages for the past wrong and an injunction against like misconduct in the future.

V

We respectfully urge that the Judgment of the Court of Appeals be affirmed and the matter at issue be ordered submitted to arbitration.

Respectfully submitted,

EDWARD MAGUIRE,
HERMAN A. GRAY,
Counsel to the New York State AFL-CIO.

INDEX

TABLE OF AUTHORITIES

Cases:

Statutes:

Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

REPLY BRIEF FOR PETITIONER

This brief is submitted in reply to respondents' brief herein and the amicus curiae brief of the New York State AFL-CIO.

ARGUMENT

I

Respondents' arguments on the merits go to the question of arbitrability of the dispute and hence must be determined by the courts after a trial.

In their brief, respondents spend a great deal of time in discussing the merits of the instant case. Respondents

argue (1) that Drake was wrong in the grievance that eventually led to the breach of the no-strike clause in question; (2) that the Union was not to blame for the strike on January 2, 1960; and (3) what happened on January 2, 1960 was not a strike within the meaning of the no-strike clause.

We will briefly discuss the merits of respondents' contentions but we submit that this is not the question before this Court. In petitioner's main brief, we contended (a) that a breach of a no-strike clause is so inconsistent with the grievance and arbitration procedure that a breaching union cannot thereafter use the grievance and arbitration machinery to prevent judicial redress for that very violation; and (b) that the arbitration clause does not cover breaches of the no-strike clause. If these positions are correct, then the question of whether or not there was in fact a breach of the no-strike clause, becomes determinative of whether or not the dispute is arbitrable. If there had in fact been such a breach, then the Union had waived its right to arbitrate or the dispute was not within the scope of the arbitration clause herein. In either event, it is not arbitrable. Likewise, if there had not been a breach of the no-strike clause in fact, then the dispute would be arbitrable.

As held by this Court in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960) all questions of arbitrability remain one for the courts, rather than for the arbitrators to determine. Accordingly, the merits of this dispute must be reserved for the courts to determine in a full trial on the merits.

The fact that the merits of a no-strike clause is for the courts, rather than for the arbitrators, was specifically found by the 6th Circuit in *International Union, United Automobile* v. *Benton Harbor Malleable Industries,*

Inc., 242 F. 2nd 536, 539-540 (6th Cir.), *cert. denied*, 355 U. S. 814 (1957):

> "We are of the opinion that the question of whether an issue is an arbitrable one under a contract of arbitration is a legal question for the Court rather than for the arbitrator in the absence of a contract giving the arbitrator such jurisdiction." Specifically quoted and followed in *Structural Steel & Ornamental Iron Association* v. *Shopmen Local Union No. 545*, 172 F. Supp. 354, 358 (D.N.J. 1959).

Again, in *Lodge No. 12* v. *Cameron Iron Works*, 257 F. 2d 467, 470 (5th Cir.), *cert. denied*, 358 U. S. 880 (1958), the Court of Appeals for the Fifth Circuit stated:

> "* * * the courts have, with practical uniformity, held a question of arbitrability to be an issue for the courts—that is the courts decide if the particular grievance is arbitrable under the terms of the collective bargaining contract. This is true even where the contract specifies that *any* controversy relating to the meaning or interpretation or application of the contract is arbitrable."

To the same effect, see e.g.:

> *Brass & Copper Workers Union* v. *American Brass Co.*, 272 F. 2d 849, 853 (7th Cir., 1959), *cert. denied*, 363 U. S. 849 (1960);
>
> *Engineers Association* v. *Sperry Gyroscope Co.*, 251 F. 2d 133, 137 (2nd Cir. 1957);
>
> *Local No. 149* v. *General Electric Co.*, 250 F. 2d 922, 927 (1st Cir. 1957), *cert. denied*, 356 U. S. 938 (1958).

The wisdom of this rule is clearly shown by the posture of the instant case. Thus, respondents have on the one

hand contended that the dispute is complex and interwoven into the entire fabric of the relationship between the union and the employer. Yet on the other hand, it is asking the courts to determine whether or not there was a breach, either on the union's denials or, at best, by weighing the conflicting affidavits of the parties. Questions of fact, on which there is such disagreement between the parties, just cannot be resolved by affidavits and affidavits are the only things that are before the courts here. The merits of the dispute, therefore, must be reserved for a full trial.

In its brief respondents spend a considerable time in discussing the merits, not only of the strike, but of the underlying grievance which led to the strike, namely, whether or not Drake had the right to schedule production for Saturday, December 26, 1959 and Saturday, January 2, 1960. In this they wax eloquent about the union members' need for a 3-day weekend and say nothing about the company's competitive need to make and sell fresh products. But again the issue before this Court is not whether Drake's competitive disadvantage in having to sell stale cake outweighed their employees' desires for a 3-day weekend. The issue is whether or not there is judicial redress for the breach of a no-strike clause.

It is particularly inappropriate to consider the question of whether or not the Union's original grievance had merit. Mr. John Mollenhauer, the Plant Manager of Drake, submitted an affidavit to the Court below in which he pointed out that Drake had the unquestioned right to schedule production on the Saturdays in question, both as an inherent management prerogative, and by virtue of the specific language of the contract. Further, the Union itself recognized this when it attempted but failed during

the course of the bargaining to have included in the contract specific prohibition against Saturday work (R 12-14).

But whether or not Drake had the right to schedule production on these Saturdays is wholly irrelevant. That question could have been raised by the Union only through the grievance and arbitration provisions of the contract which was established as the exclusive method of resolving such issues. Instead, the Union relied on its own economic power. When it chose to utilize self help, it thereby breached the no-strike clause regardless of the merits of Drake's contention that it had the right to reschedule production.

An abundance of authority holds that the merits of the dispute which led a union to breach a no-strike clause is irrelevant to determine whether or not there had been a breach of that clause. To do otherwise would destroy the fundamental means of settling the inevitable disputes which arise under any collective bargaining agreement and substitute instead the anarchy of resort to self help, or in the words of this Court in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 580 (1960) instead of having the labor-management "relationship governed by an agreed upon rule of law", it would leave "each and every matter subject to a temporary resolution dependent solely on the relative strength, at any given moment of the contending forces."

Thus, the late Dean Harry Shulman, one of the country's outstanding labor authorities, stated in *Ford Motor Co.*, 3 L. A. 779, 780-781 (1944):

> "Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous

> point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure. But, in the second place, and more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violations which would require adjustment. That procedure is prescribed for all grievances, not merely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help. The only difference between a 'clear' violation and a 'doubtful' one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner."

This was specifically held by the Second Circuit in *Shirley-Herman Co.* v. *International Hod Carriers*, 182 F. 2d 806 (2d Cir. 1950). In that case, a 301 action brought for breach of a no-strike clause, the lower court refused to admit testimony concerning the merits of the dispute which led to the work stoppage there in question. The Court sustained that ruling of the lower court in the following language, at page 810:

> "But the court correctly limited the issue before the jury to the single question whether the union had caused a 'cessation of work' without going to arbitration. The merits of the dispute were of no moment, since the union had promised that regardless of the nature of a dispute which might arise, it would not cease work but would keep on the job

> until the dispute was settled by the machinery provided for in the contract. This, as the jury found, the union had not done."

To the same effect: *International Union, United Automobile* v. *Benton Harbor Malleable Industries*, 242 F. 2d 536, 540-541 (6th Cir.), *cert. denied*, 355 U. S. 814 (1957).

Similarly, we need not discuss at length respondents' contention that it was not responsible for what happened on January 2, 1960. But the respondents' contention is at complete variance with the allegations of the complaint that the January 2, 1960 strike was "authorized, instigated and encouraged" by the Union (Par. Eighth, R. 4). We submit that the courts cannot resolve the issues of fact raised by the complaint solely upon the Union's version of the incident as presented in its own affidavit.

As for the question of whether or not what happened on January 2, 1960 was a strike, we submit that that question is foreclosed by the wording of the no-strike clause here. That clause not only prohibits "strikes" but also "boycotts, interruption of work, stoppage, temporary walkout or lockout for any reason during the term of this contract" (R 8). Even if what happened was not a strike, it certainly was either an "interruption of work", a "stoppage" or a "temporary walkout"—all equally prohibited by the contract. Any argument that there was no strike is completely baseless in the light of the broad contractual prohibitions against any interference with normal production.

Thus this Court is left with the issues presented by petitioner in its main brief—whether or not a union's breach of a no-strike clause waives its right to arbitrate that breach and whether or not the breach of a no-strike clause is within the scope of the arbitration clause. All of respondents' attempts to change the issues are, we submit, completely unavailing.

II

The interests of industrial peace are best served by imposing the sanction of judicial redress against a breach of a no-strike clause.

In this term, this Court has on three different occasions restated that the basic purpose of Section 301 was the promotion of industrial peace. *Charles Dowd Box Co.* v. *Courtney* U. S. , 7 L. ed. 2d 483, 488 (1962); *Retail Clerks International Association* v. *Lion Dry Goods, Inc.* U. S. , 7 L. ed. 2d 503, 510 (1962); *Local 174* v. *Lucas Flour Co.* U. S. , 7 L. ed. 2d 593, 600 (1962). These cases reiterate the fundamental contention of petitioner's main brief that the issues in this case and all 301 cases must be viewed in light of "the basic policy of national labor legislation to promote the arbitral process as a substitute for economic welfare." *Local 174* v. *Lucas Flour*, *supra* at 600. In particular, the *Lucas Flour* case follows the authorities set forth at length in our main brief to the effect that a strike, even in the absence of a specific no-strike clause, is a breach of the arbitration clauses of a contract. The contentions of the New York State AFL-CIO that the no-strike clause and the grievance and arbitration clause are no more important than any other clause in the contract are completely rebutted by these recent cases and their predecessors.

Respondents in their brief contend that the emphasis on this point in petitioner's main brief is misplaced. Respondents argue that it is legally permissible for an employer to obtain from an arbitrator damages for the breach of a no-strike clause, and in the past some arbitrators have indeed awarded such damages. We may say

parenthetically that this is the only proposition for which *Matter of Publishers Association (New York Stereotypers)*, 8 N. Y. 2d 414 (1960) stands. But whether or not arbitrators can legally award damages, the questions remain whether or not an arbitrator is as likely to award damages as a court and whether or not the threat of arbitrating a breach of a no-strike clause provides a sufficient deterrent to prevent such a breach in the future. We submit that as set forth in petitioner's main brief, an arbitrator is just not likely to depart from his role as peacemaker and impose upon either party to a collective bargaining contract the sanctions which its conduct calls for. Instead, this role is best played by a court which can mete out the appropriate sanction without worrying about jeopardizing its continuing relationship as a peacemaker.

We submit that the considerations which make arbitration the most desirable way to settle the numerous questions which necessarily arise in the day to day operation of an industrial plant just are not applicable here. Ordinarily the arbitration processes help keep the industrial peace. But in a breach of the no strike clause situation, the industrial peace has already been broken and the issue is what can be done to prevent such abnormal situations in the future.

Respondent spends a great deal of time in discussing what would be best in the particular case at bar. We submit that the question is not what is the best way to dispose of breaches of a no-strike clause already in dispute, but rather what is the way to prevent future breaches. To this, we submit, that the prospect of having to face a court will deter far more breaches of no-strike clauses than will the prospect of having to face an arbitrator.

Respondent attempts to comfort petitioner by stating that in any event it can obtain "judicial redress" after the arbitration simply by moving to confirm the award of the arbitrator. But at that time it will have been too late. If prior state law is any criterion, the attacks on the award will be limited to a few exceptional situations. See New York Civil Practice Act, Sections 1458, 1461, 1462 and 1462-a. The merits of the arbitrator's award will not even be considered by a court. In the light of the legislative history and wording of section 301 as set forth in petitioner's main brief, we submit, that this is not what Congress had in mind when it passed Section 301.

CONCLUSION

For all the reasons set forth in the main brief and herein, the judgment of the Court of Appeals for the Second Circuit should be reversed, and this case remanded to the United States District Court for the Southern District of New York, for trial.

Respectfully submitted,

ROBERT ABELOW,
Attorney for Petitioner,
60 East 42nd Street,
New York 17, New York.

Of Counsel:

MILTON HASELKORN,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES.